No. 18259

In the

United States Court of Appeals

For the Ninth Circuit

Santa Cruz Portland Cement Company,
a corporation,
Appellant,

vs.

United States of America,
Appellee.

Brief for Appellant

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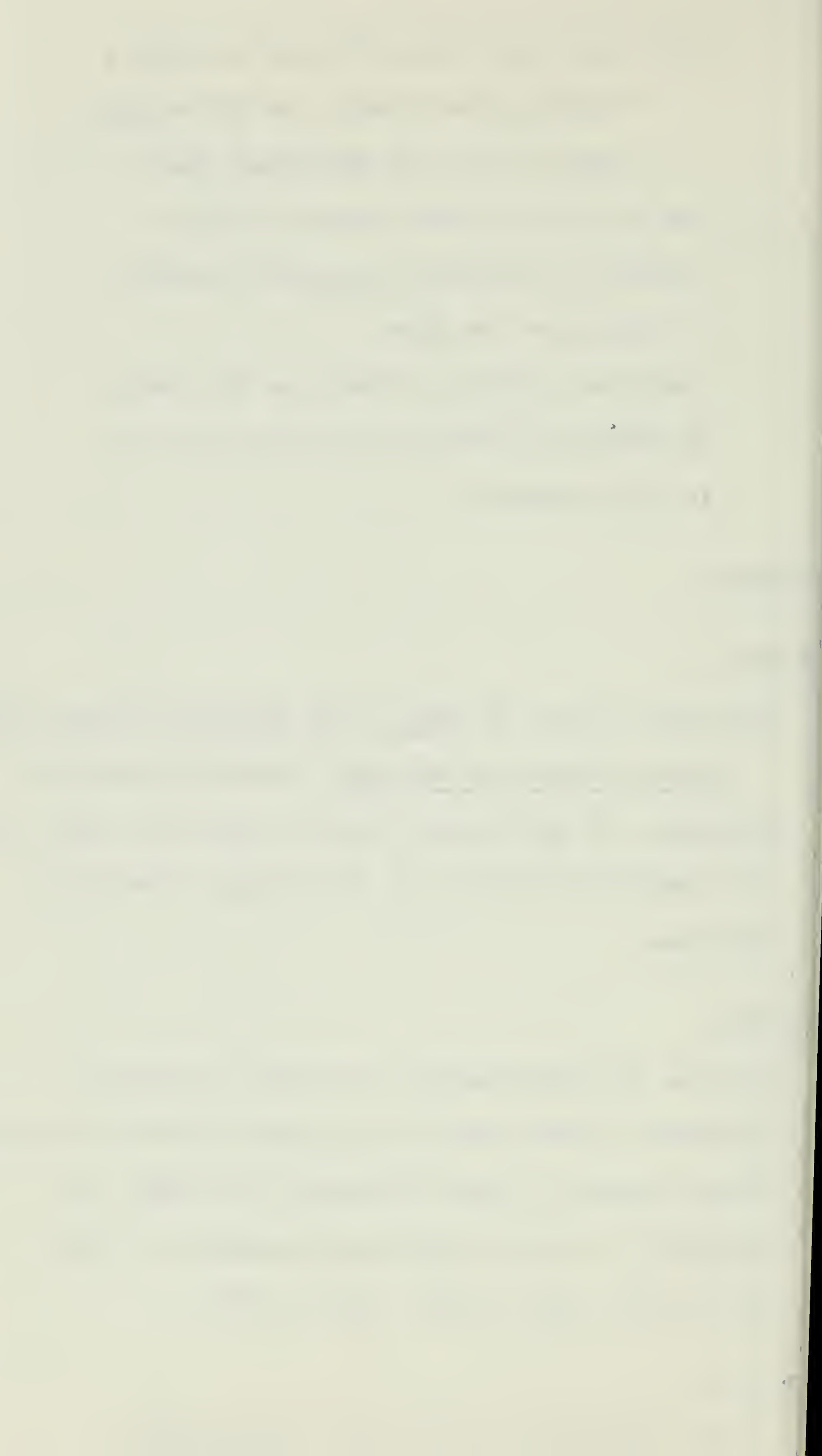

PPENDIX D

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PPENDIX E

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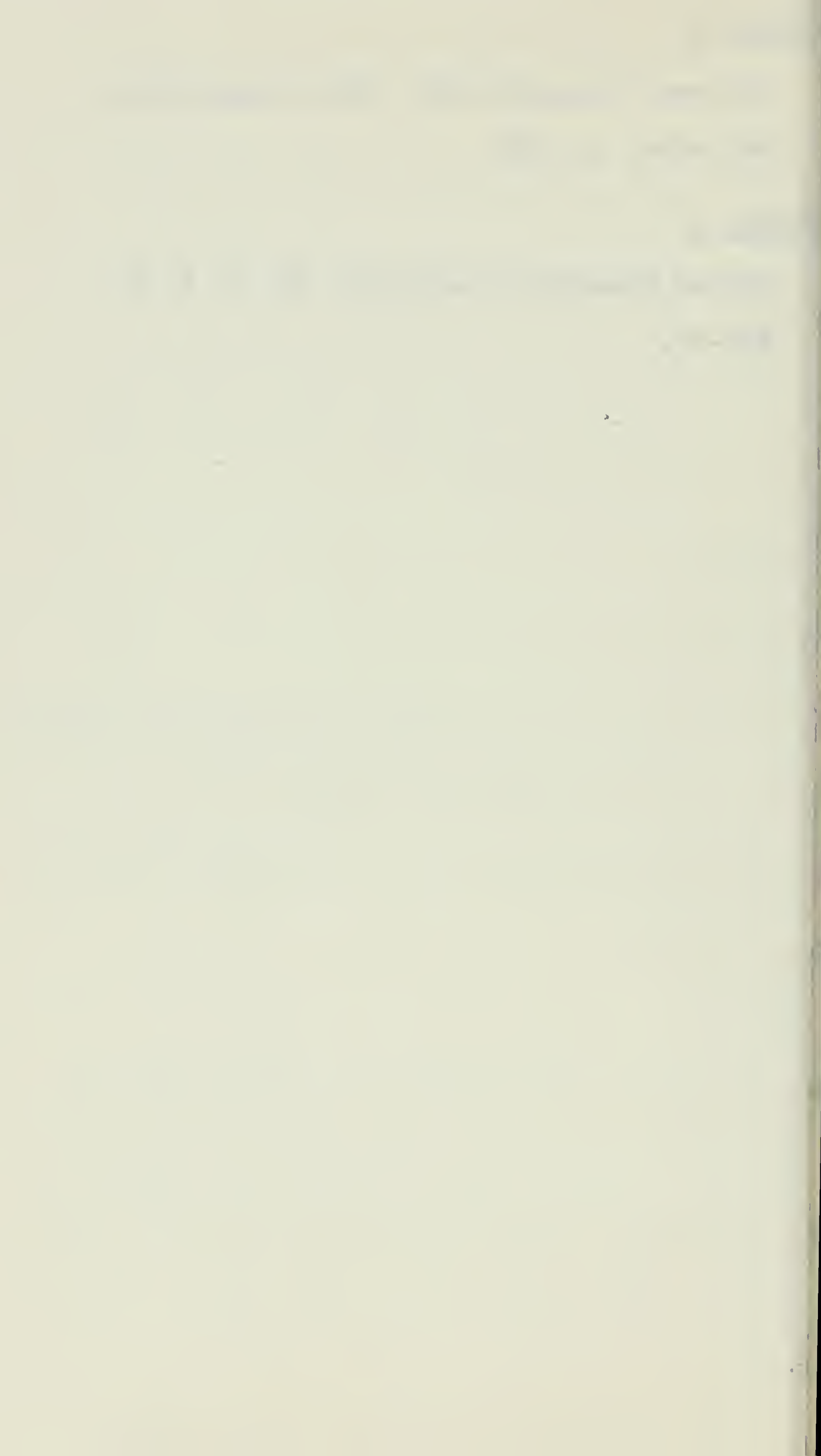

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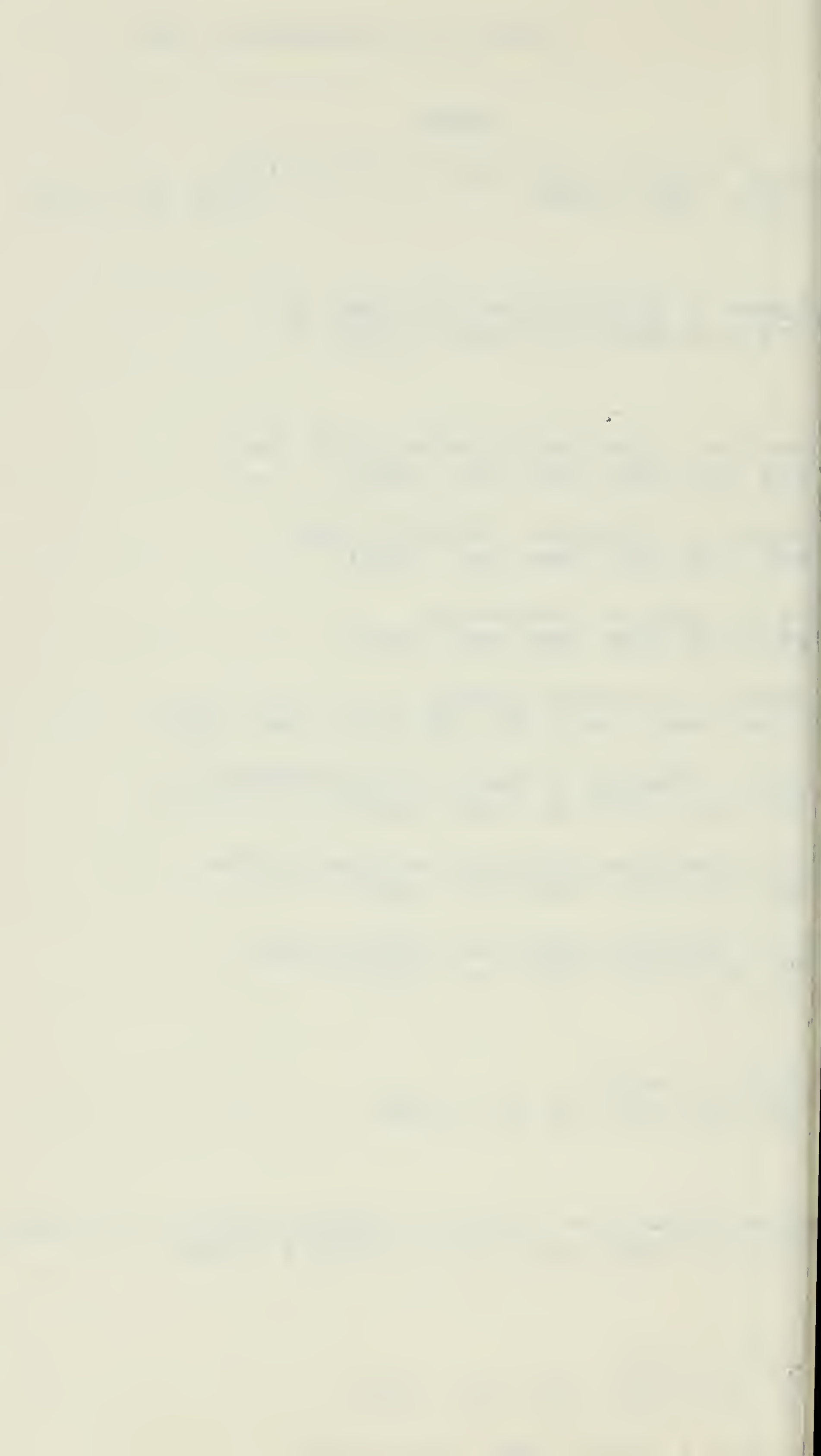

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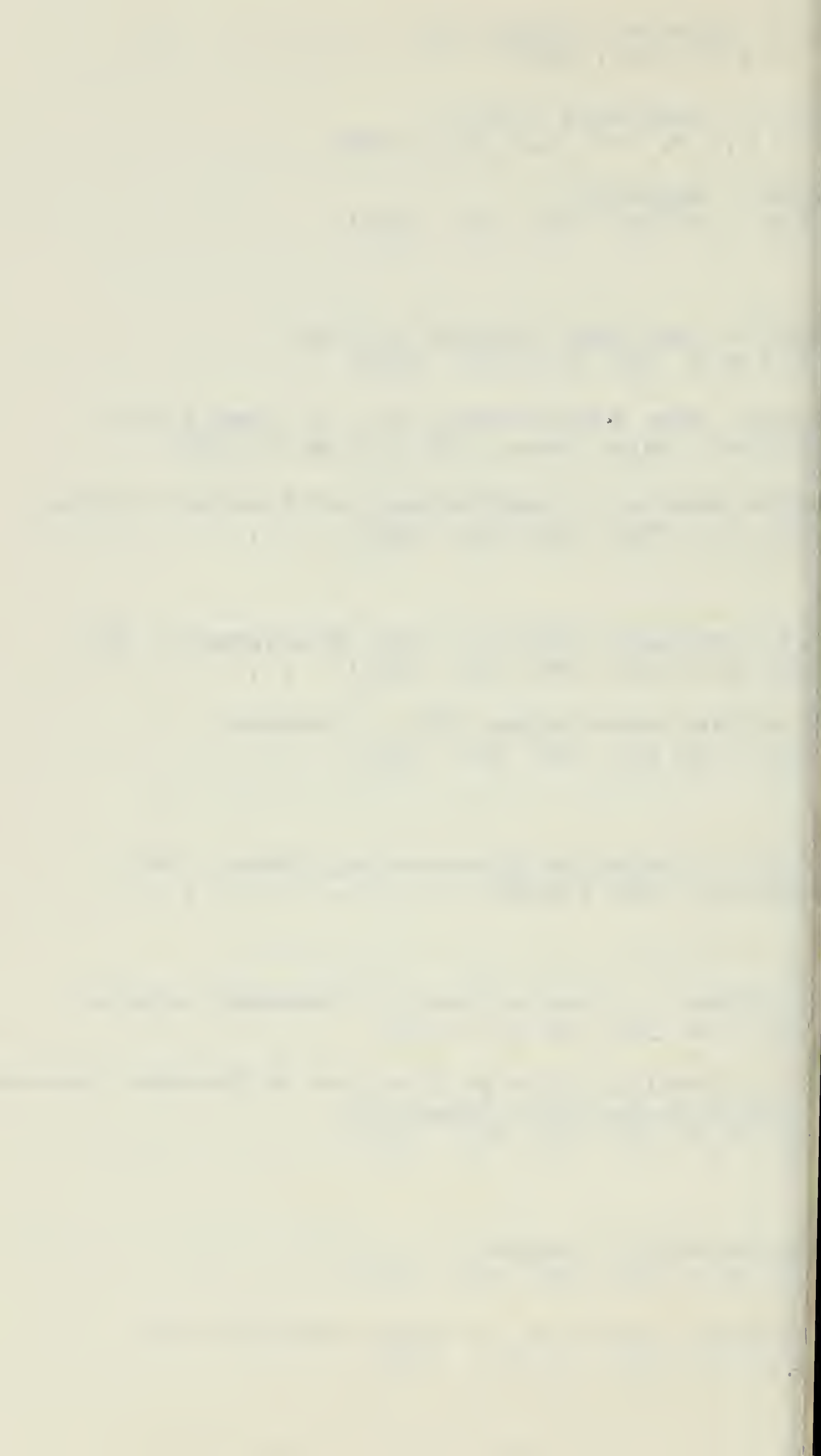

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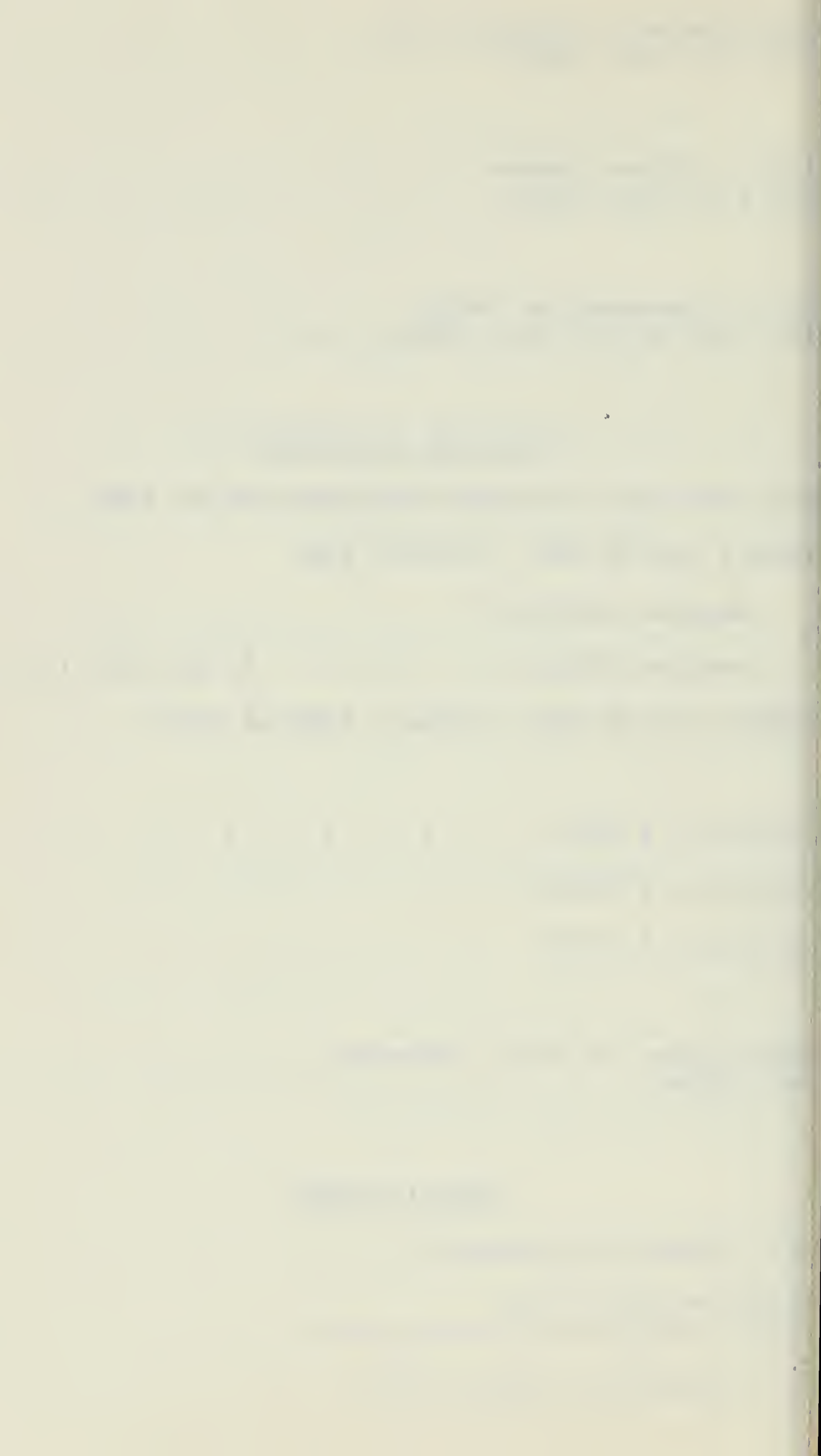


No. 18259

In the

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

SANTA CRUZ PORTLAND CEMENT COMPANY,
a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

This is an appeal from an order of the District Court ranting defendant's motion for summary judgment and dismissing laintiff's complaint with prejudice. The case is an action by laintiff and appellant Santa Cruz Portland Cement Company gainst the United States for recovery of internal revenue taxes lleged to have been erroneously or illegally assessed or col- ected for the calendar years 1951 and 1952 (R.2-41). An nswer to the complaint has been filed by the government (R.42- 5). No proceedings have been had in the case other than the earing on the government's motion for summary judgment (which as granted) and three previous continuances, granted pending determination by the Internal Revenue Service of plaintiff's imilar claims for refund for the later years 1953 through 956 (R.64-65). The questions for decision are whether the ourt below erroneously granted the motion for summary judgment nd dismissed the action, and whether the court below abused its scretion in denying plaintiff's motion for continuance.

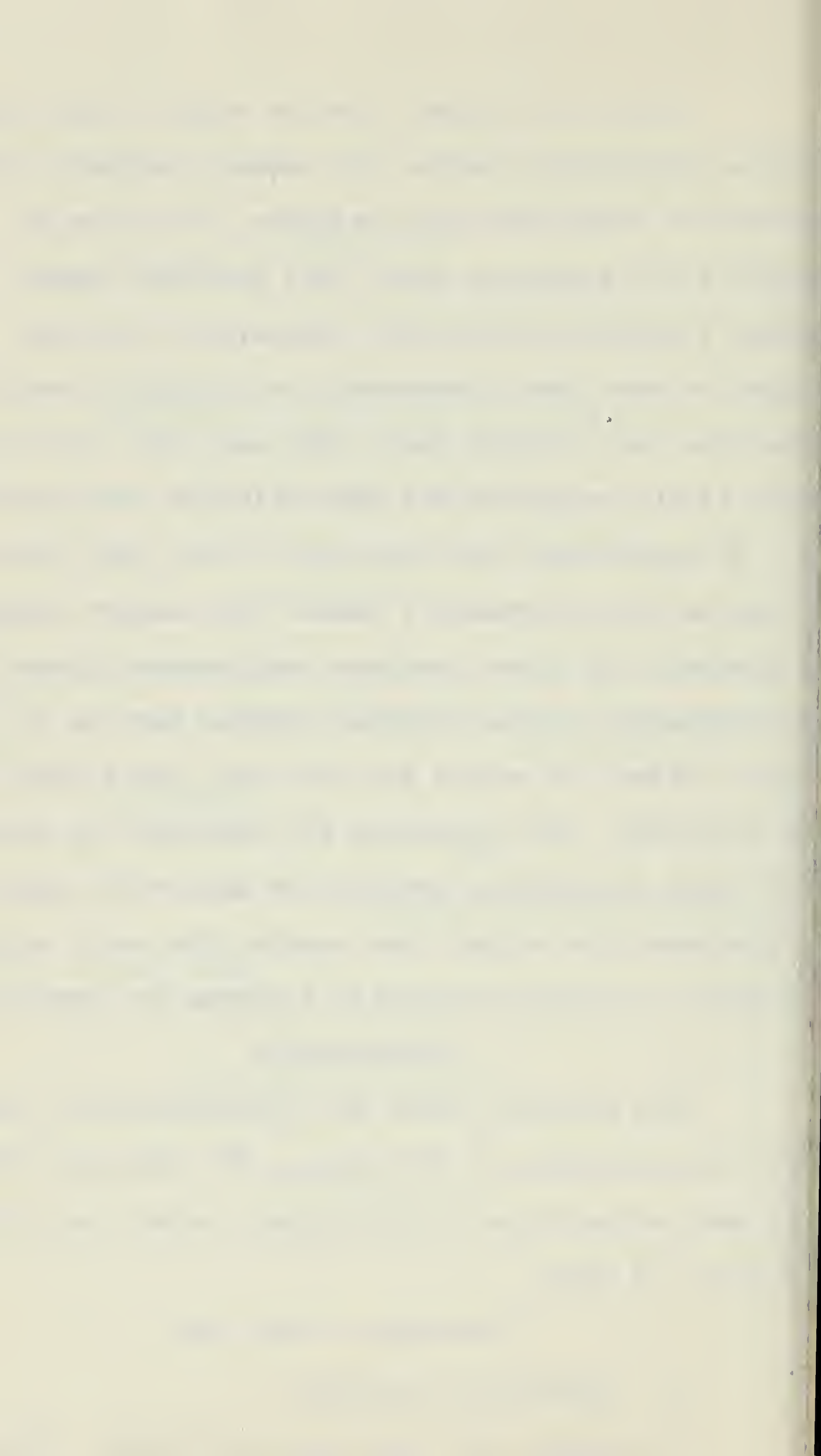
JURISDICTION

The District Court had jurisdiction of this action nder the provisions of 28 U.S.C.A. §§ 1340 and 1346a. This ourt has jurisdiction of this appeal under the provisions of 8 U.S.C.A. § 1291.

STATEMENT OF THE CASE

1. Summary of the Case.

In essence the facts are as follows: The Commissioner



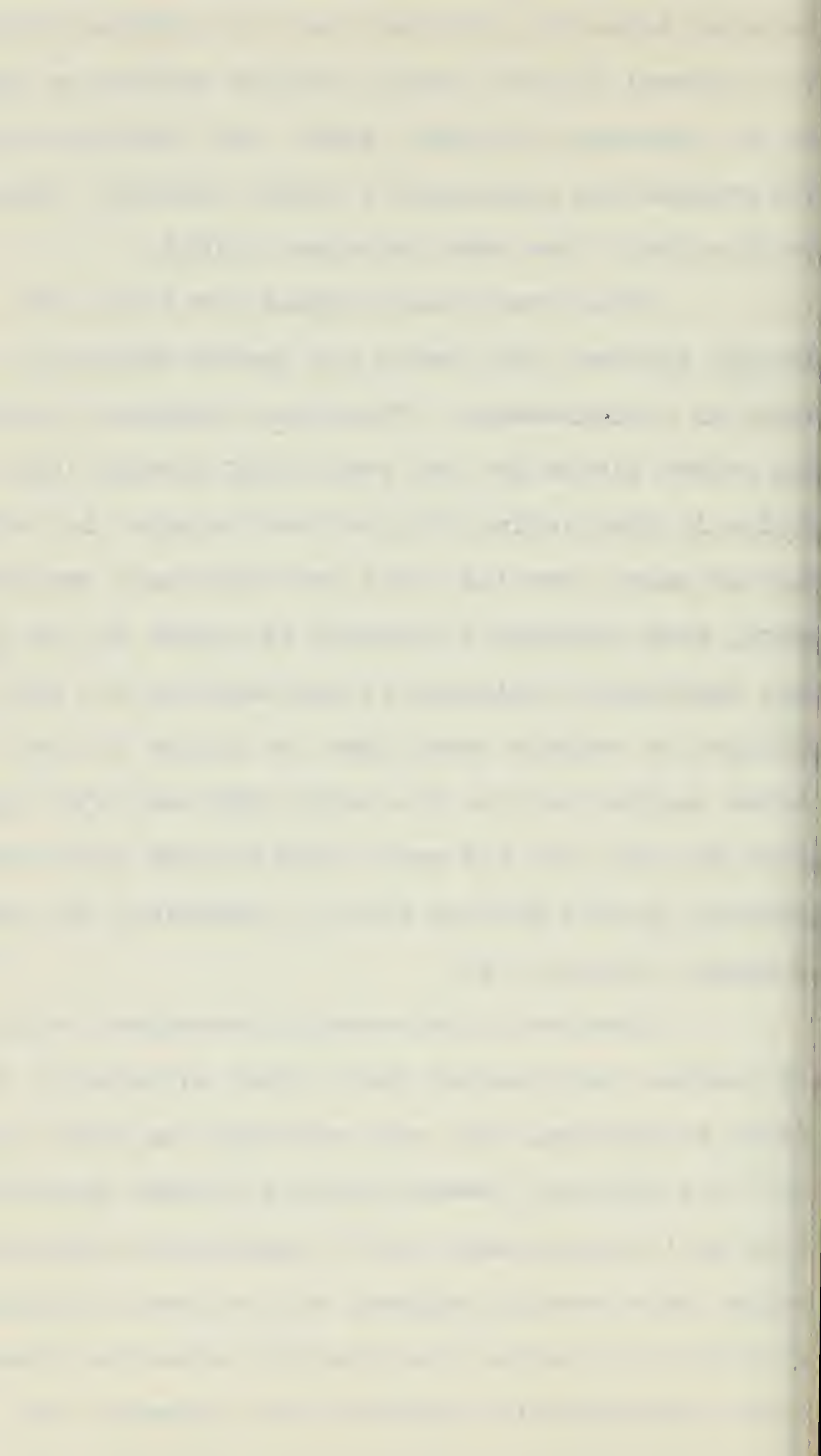
f Internal Revenue made representations through official publi-
ations to appellant, Santa Cruz Portland Cement Company (tax-
ayer) that he would recognize certain refund claims for net
perating losses carried back to the years 1955 and 1956, but
hat he would offset alleged deficiencies resulting from sup-
osed excessive depletion deductions for the years 1951 through
956 against such refunds unless the taxpayer made an election
nder the Public Debt and Tax Rate Extension Act of 1960 to
orego certain refund claims relating to depletion for the years
951 through 1956 (R.65-66). Taxpayer made said election (R.57-
8). Thereafter the Internal Revenue Service entered into a
ettlement agreement with taxpayer wherein the Service recog-
ized the taxpayer's net operating loss claims and taxpayer
ffirmed its election to forego its depletion claims and gave
p certain other claims (R.66-68). Subsequent to that agree-
ent, the Commissioner announced that he had changed his mind
bout the representation which he had formerly made relating to
he recognition of the net operating loss claims (R.68). Later,
he Internal Revenue Service informally told taxpayer that be-
ause of the Commissioner's changed position, the Service might
epudiate the settlement agreement (R.68, 121-22).

Before the Internal Revenue Service acted upon the
greement, the government made its motion in this action for
ummary judgment in the District Court below for dismissal
f taxpayer's refund action based upon additional depletion
or the years 1951 and 1952 on the ground that taxpayer's elec-
ion made its claims for those years unenforceable (R.51-62).

Taxpayer asked the District Court to continue this action until the Internal Revenue Service decided whether or not to abide by its agreement (R.63-82, 122). The District Court refused and granted the government's motion (R.104). Taxpayer appeals to this Court from that decision (R.105).

After the present appeal was filed, the Internal Revenue Service still would not decide whether or not to abide by the agreement. Therefore, taxpayer filed suit upon its refund claims for the years 1953 through 1956. The complaint in that action alleges that taxpayer is entitled to refunds based upon its claim for additional depletion for those years, that taxpayer's election in regard to the claims based upon additional depletion is not binding, and that taxpayer is entitled to refunds based upon its claims for net operating losses carried back to the years 1955 and 1956 (Appendix A). After the suit for the years 1953 through 1956 was filed, the Internal Revenue Service finally repudiated the settlement agreement (Appendix B).

Therefore, the essential questions before this Court are whether the District Court erred in refusing taxpayer's motion to continue this case covering the years 1951 and 1952 until the Internal Revenue Service decided whether or not to abide by its agreement, and in granting the government's motion for a summary judgment on the ground taxpayer was bound by its election, particularly since the Internal Revenue Service subsequently repudiated its agreement and taxpayer is now going to try the issue as to the validity of the election



r the years 1953 through 1956 in the companion case (ppendix A).

2. Facts of the Case.

Appellant Santa Cruz Portland Cement Company (axpayer) is a corporation in the process of voluntary dis- lution (R.2). Taxpayer had been engaged in the business of oducing and selling cement (R.3) which included the mining limestone (calcium carbonates) used in the manufacture of ment (R.4, 64). Timely claims for refunds of overpayment of rporation income taxes were filed by the taxpayer.* The ims related to (1) the amount of depletion deduction for cium carbonates for the years 1951 through 1956 and (2) operating loss carrybacks to the years 1955 and 1956 for sses incurred in the years 1957, 1958 and 1959 (R.64).

The Commissioner of Internal Revenue denied the eund claims for the years 1951 and 1952. Therefore, tax- aer was required to bring this action on the claims for hse years in order to prevent the bar of the statute of

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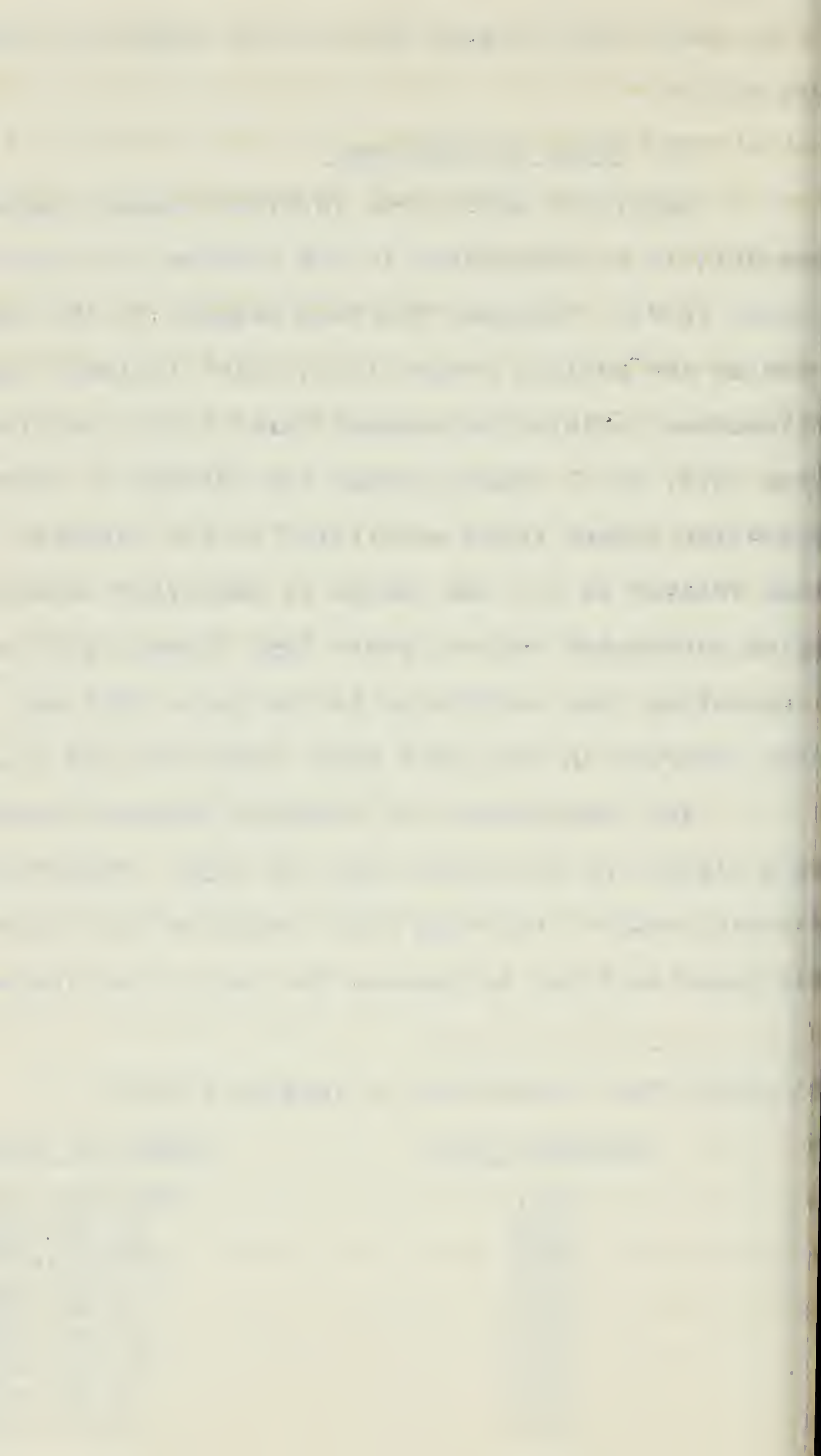
Te claims for refund were as follows (R.64):

CALENDAR YEAR	AMOUNT OF CLAIM
1951	$125,273.53
1952	97,726.90
1953	162,195.24
1954	115,446.59
1954	30,451.68
1955	527,276.98
1955	24,550.40
1956	63,370.15
1956	66,570.50

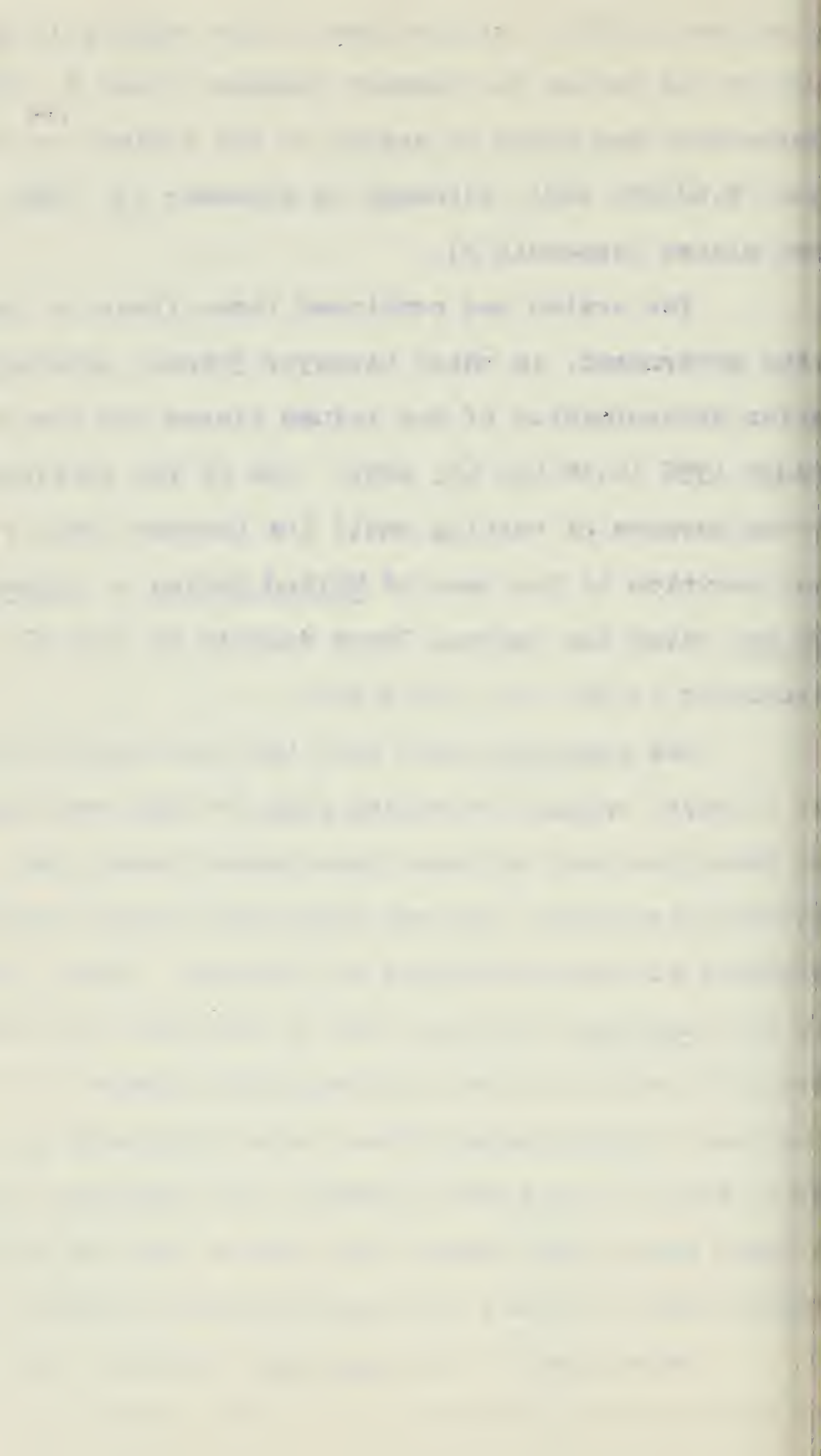


imitations (R.64). At the time of the hearing in the District
Curt on the motion for summary judgment (June 6, 1962) the
mmissioner had taken no action on the claims for the later
ars (R.68-70, 122), although on November 13, 1962, he denied
ose claims (Appendix B).

The action was continued three times at the request
the government, in which taxpayer joined, pending adminis-
ative determination of the refund claims for the years 1953
rough 1956 (R.46-50, 64, 109). One of the continuances was
the purpose of waiting until the Supreme Court rendered a
al decision in the case of <u>United States</u> v. <u>Cannelton Sewer</u>
<u>e Co.</u> which the Supreme Court decided on June 27, 1960, and
reported at 364 U.S. 76 (R.65).

The <u>Cannelton</u> case held that the depletion allowance
a taxpayer engaged in mining clay and the manufacture of
e therefrom must be based upon gross income from processes
idental to mining, but not upon gross income from processes
idental to the manufacture of the pipe. Thus, it appeared
m the <u>Cannelton</u> decision that no recovery was possible on
payer's refund claims relating to the amount of depletion
uctions (R.66) because those claims were made on the
mise that in the cement industry the depletion allowance
based upon gross income from sale of the end product
ment) which included all manufacturing processes (R.66).

Subsequent to the <u>Cannelton</u> decision, the Public
t and Tax Rate Extension Act of 1960 (Public Law 86-564,
Stat. 290) was enacted by Congress. Section 302(b)(4)

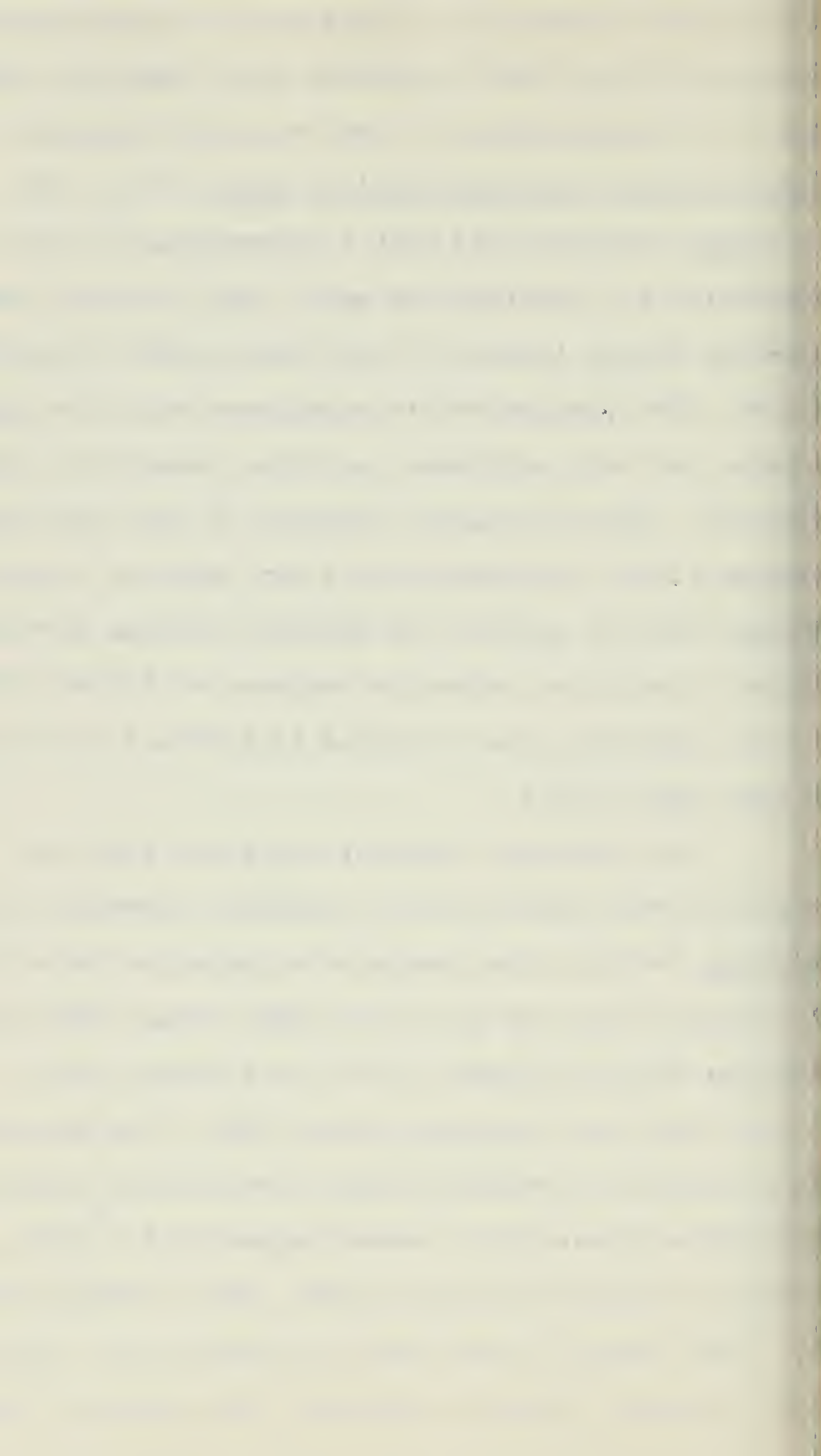


rovided that in computing depletion in the mining of calcium
abonates and other minerals when used in making cement, the
erm "mining" includes "all processes (other than preheating
f the kiln feed) applied prior to the introduction of the kiln
eed into the kiln, but not including any subsequent process."
n amendment (Public Law 86-781, 74 Stat. 1017 at 1018) per-
itted the taxpayer to elect to apply the provisions of Section
0(b)(4) to all taxable years beginning before January 1, 1961
R 65). Such an election for the years 1951 through 1956 would
revent taxpayer from claiming refunds based upon depletion
eductions, and the government could not claim that under the
annelton case taxpayer had taken excessive depletion deduc-
ions on its returns for those years and therefore offset the
esulting deficiencies against taxpayer's claims based upon net
perating losses for the years 1957 through 1959 and carried
ack to 1955 and 1956. (The government could only assert off-
ets against taxpayer for any alleged excessive depletion
eductions for the years 1951 through 1956 because the statute
f limitations prevented the assessment of deficiencies against
axpayer for those years.)

After the Cannelton decision and the enactment of
ublic Debt and Tax Rate Extension Act of 1960 referred to
bove, the taxpayer was in the following position: If the
annelton decision was applicable to cement manufacturing, no
urther recovery on the taxpayer's claims relating to depletion
eductions was possible. However, with respect to the 1957-
59 net operating losses, taxpayer could anticipate recovery

a his claims because the Commissioner had previously anounced that he would recognize such losses by the publicaton of his acquiescence in the tax court decision in Aampo Wineries and Distilleries, Inc., 7 T.C. 629 (1946). Te Acampo decision held that a corporation in the course of lquidation was permitted to carry back to prior years net cerating losses incurred in the years after liquidation sarted. The Commissioner's acquiescence in the Acampo dcision had been published in 1949-1 Cumulative Bulletin, p. 1 (.65-66). (The applicable portions of the Cumulative Bulletin rlating to the acquiescence are set forth in Appendix C.) Prsuant to that policy, the Internal Revenue Service had even alowed a tentative refund to taxpayer of $17,426.62 based c a net operating loss incurred in 1959 and carried back to te year 1956 (R.66).

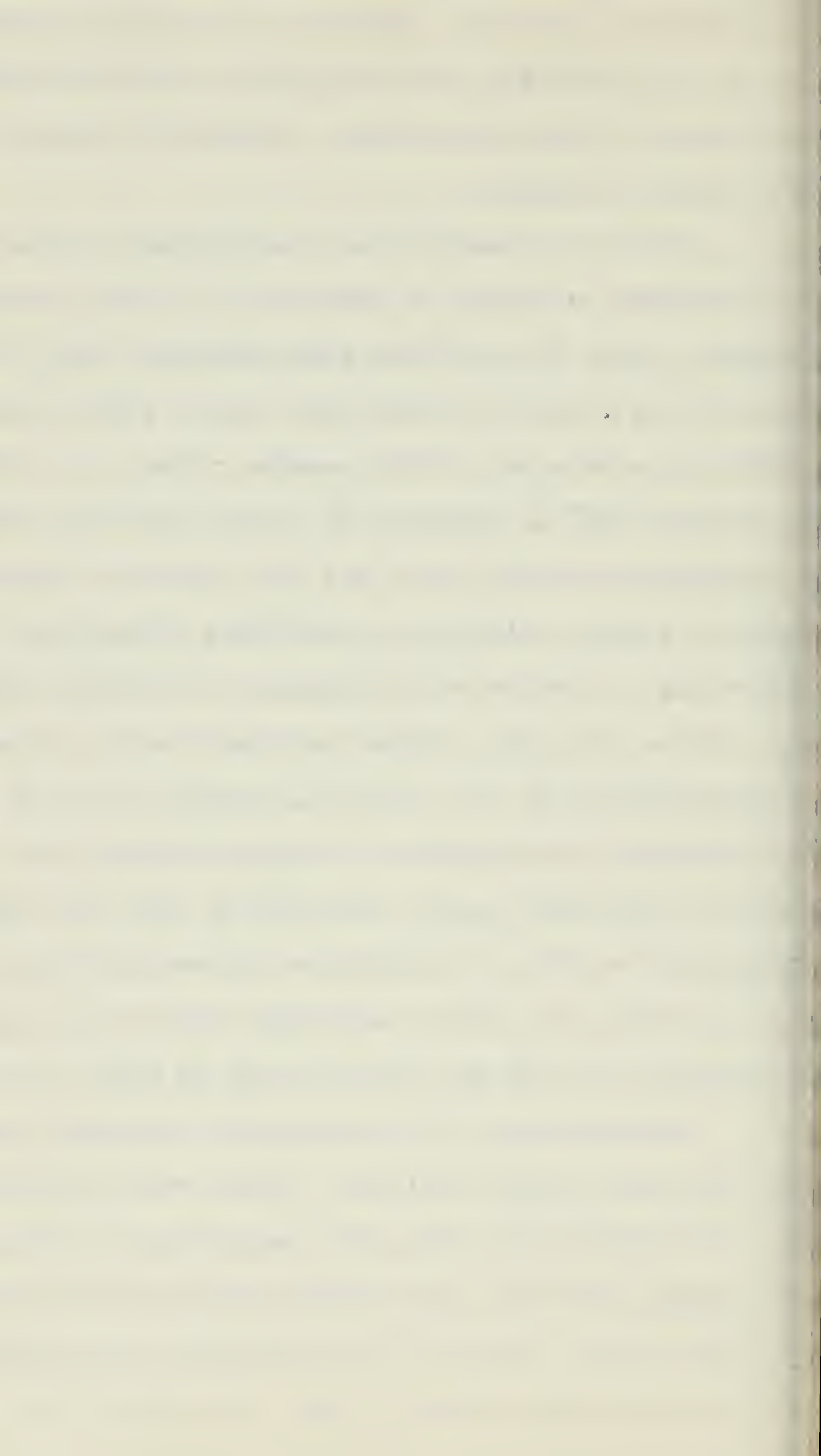
In addition, taxpayer was aware that the Internal Rvenue Service would take the position pursuant to the Cnnelton decision that taxpayer's depletion deductions upon is returns filed for the years 1951 through 1956 were ecessive unless taxpayer filed the election under the Public Dbt and Tax Rate Extension Act of 1960. The Internal Revenue Srvice publicly announced such a position in Technical Iformation Release 257, issued September 23, 1960, later ebodied in Revenue Ruling 60-320, 1960-2 Cumulative Bulletin 18. (The ruling is set forth in Appendix D.) Therefore, ulless taxpayer filed the election, the Internal Revenue Srvice would attempt to offset any deficiencies resulting



rom excessive depletion deductions against the refund claims
sed on net operating loss carrybacks with the result of
iminishing, if not eliminating, plaintiff's recovery on those
tter claims (R.66-67).

With the knowledge of the foregoing facts and law
ad in reliance on them, on November 14, 1960, taxpayer, by its
drectors, filed its election under Section 302(c) of the
Pblic Debt and Tax Rate Extension Act of 1960 as amended and
i furtherance thereof, filed amended returns for the years
151 through 1956 on February 24, 1961 (R.57-60, 66-67). If
th election was valid, this had the effect of relinquishing
taxpayer's claims relating to depletion deductions.
Subsequently, a settlement agreement was entered into by tax-
payer and the Internal Revenue Service whereby taxpayer acceded
to a disallowance of its claims for refund relating to deple-
tion deductions and accepted an overassessment for 1955 relat-
ing to net operating losses incurred in 1957 and 1958 and
carried back to 1955. The Internal Revenue Service also
agreed to allow the refund resulting from the net operating
los incurred in 1959 and carried back to 1955 (R.67-68, 73-74).

Unfortunately, the situation regarding taxpayer's
claims was not finally resolved. There were further develop-
ments. On October 23, 1961, the Commissioner's acquiescence
in the Acampo decision, upon which taxpayer had relied and
which had been the basis of the settlement agreement, was
withdrawn in Revenue Ruling 61-191, which was first published
in Internal Revenue Bulletin 1961-43 at page 18 (October 23,



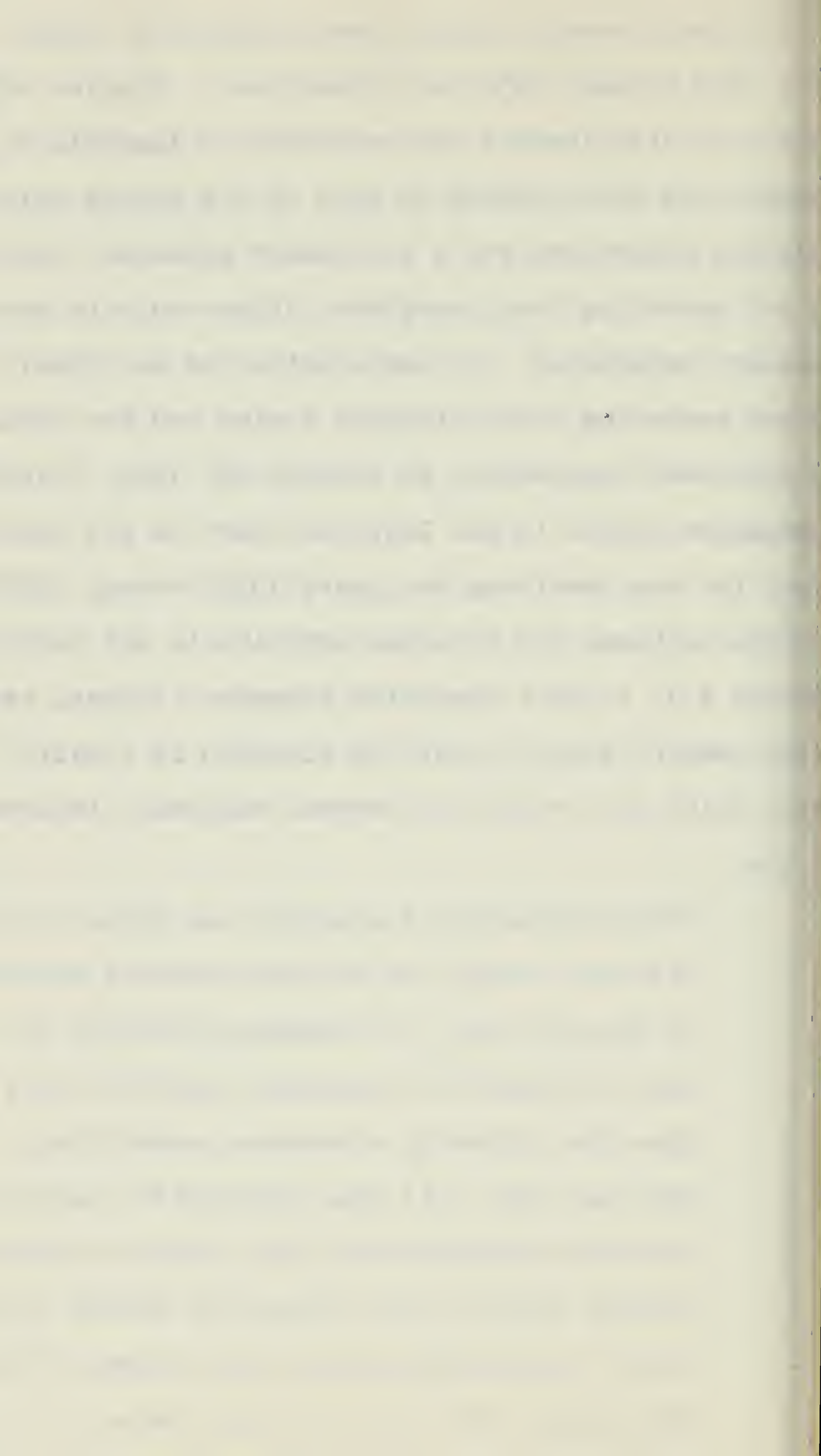
51) and is now permanently bound in 1962-2 Cumulative Bulletin 251 (R.68). (The ruling is set forth in Appendix E.) On March 23, 1962, this Court entered its decision in R. A. Riddell, District Director of Internal Revenue v. Monolith Portland Cement Co., 301 F.2d 488 (9th Cir. 1962), which held that the Cannelton case, upon which taxpayer relied, was not applicable to a company, such as taxpayer, which mined and produced cement (R.68-69). Further, the Internal Revenue Service had stated to taxpayer informally that in view of the Commissioner's withdrawal of his acquiescence in the Acampo decision, taxpayer's settlement agreement with the Internal Revenue Service might be repudiated (R.68, 121-22).

On June 4, 1962, the government successfully moved for summary judgment in this action (R.104). The government contended that the taxpayer's election had eliminated any factual issues in the present refund suit (involving the years 1951 and 1952) (R.55-56, 115). Taxpayer unsuccessfully opposed the motion on the ground that at that time it was not possible to determine fully whether the election had been made pursuant to material mistakes of fact and law which would render it invalid (R.63-70). Therefore, as an alternative to summary judgment, taxpayer unsuccessfully moved to continue the action until a final determination was made by the Internal Revenue Service regarding the settlement agreement and until the decision in the Monolith case became final (R.79-81).

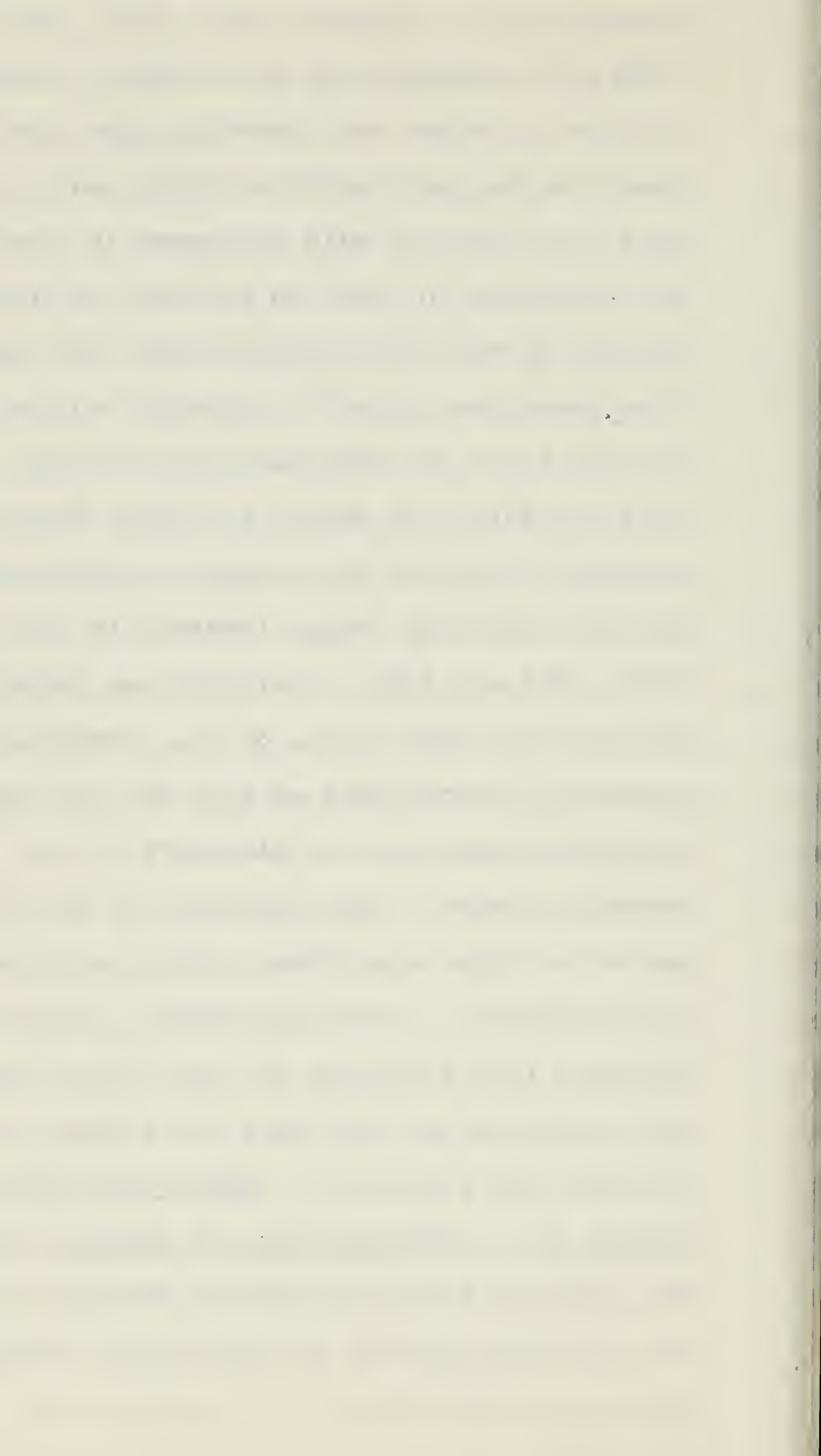
Thereafter, the fears of taxpayer were realized. On [illegible]mber 13, 1962, the settlement agreement was repudiated by

te Internal Revenue Service when taxpayer's claims for the years 1953 through 1956 were disallowed. (Copies of the notices of disallowance are set forth in Appendix B.) Thus, taxpayer had been induced to give up its claims relating to depletion deductions for a settlement agreement recognizing its net operating loss carryback claims--only to have the agreement repudiated. In anticipation of the disallowance of its net operating loss carryback claims and the repudiation of the settlement agreement, on October 22, 1962, taxpayer filed a companion action in the District Court on its claims for refund for the remaining tax years 1953 through 1956. (The complaint without its attached exhibits is set forth in Appendix A.) In that complaint taxpayer alleges, as it does in the instant action, that the election is invalid because it was filed as a result of several material mistakes of fact and law:

> "Said statement of election was filed by plaintiff as a result of several material mistakes of fact and law. In causing plaintiff to file said statement of election, plaintiff relied upon the following erroneous propositions of fact and law: (i) that plaintiff's legally allowable depletion for the calendar years 1951 through 1956 did not exceed the amount claimed in its corporation income tax returns filed for said years; (ii) that certain claims for refund by plaintiff relating to net operating losses



incurred in the calendar years 1957, 1958 and 1959 were recognized by the Internal Revenue Service as proper net operating loss carry-backs to the years 1955 and 1956; and (iii) that the filing of said statement of election was necessary in order to prevent the Internal Revenue Service from claiming that the depletion deductions taken by plaintiff on its returns filed for the years 1951 through 1956 were excessive and should be offset against plaintiff's claims for refunds relating to the net operating losses incurred in the years 1957, 1958 and 1959. Plaintiff was induced into relying upon some or all of the foregoing erroneous propositions of fact and law upon representations made to plaintiff by the Internal Revenue Service. Said election was and is void and of no force and effect and is not binding upon plaintiff; in the alternative, defendant is estopped from asserting in this action that said election has any force and effect and is binding upon plaintiff." Santa Cruz Portland Cement Co. v. United States of America, Action No. 41063 in the United States District Court of the Northern District of California, Southern Division, Complaint p. 4, l. 11 to p. 5, l. 5 (Appendix A, p. 4).



On October 15, 1962, the Supreme Court was etitioned to grant certiorari in the Monolith case (31 U.S.L. eek 3149 (U.S. Oct. 30, 1962)). The Supreme Court has not ted upon the petition as of the date of this brief.

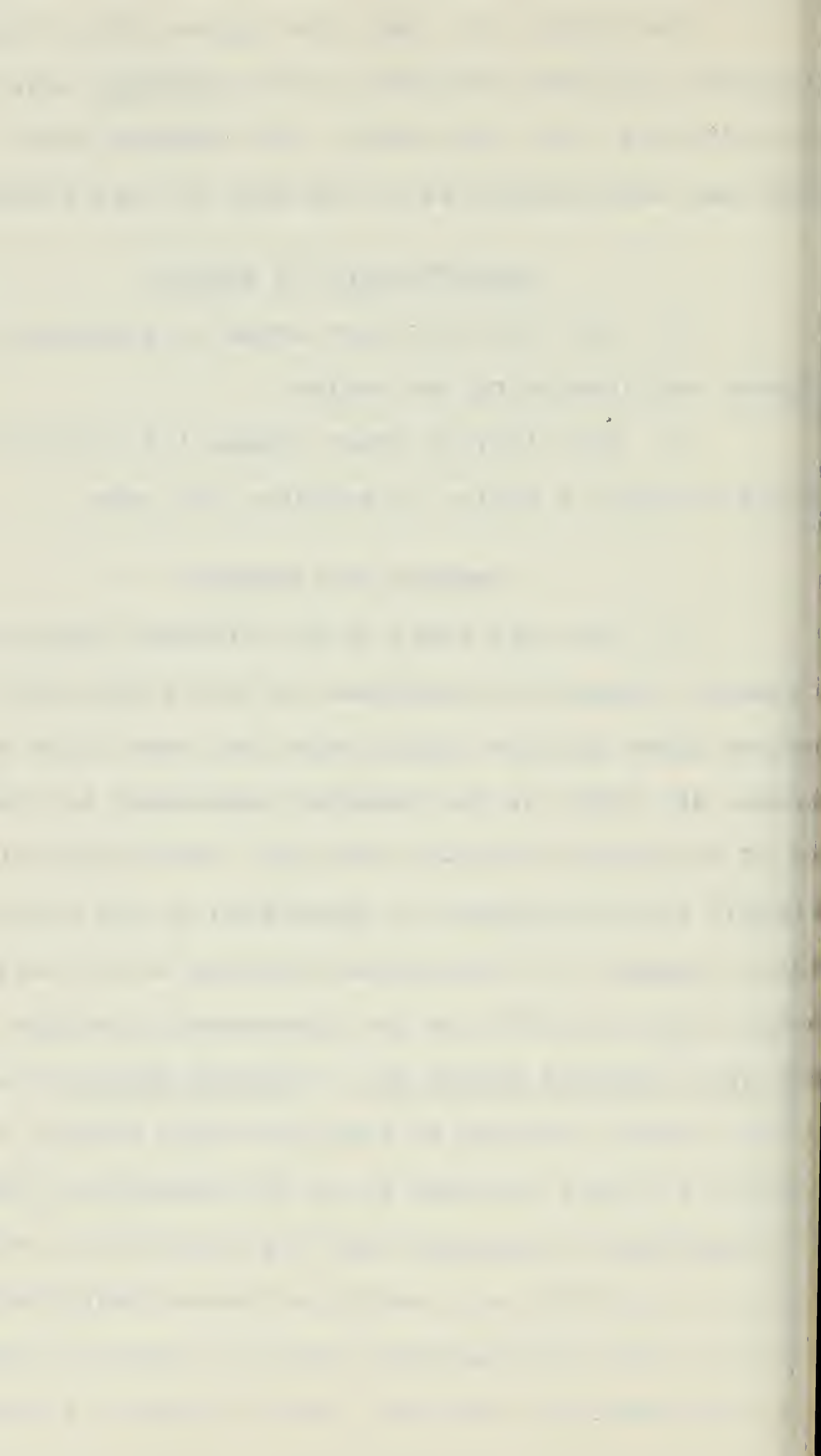
SPECIFICATION OF ERRORS

1. The District Court erred in granting summary jdgment and dismissing the action.

2. The District Court abused its discretion in nying taxpayer's motion to continue the case.

SUMMARY OF ARGUMENT

1. The sole basis of the District Court's entry summary judgment and dismissal of the action was the ection under Section 302(c) which had been filed on vember 14, 1960, by the taxpayer subsequent to the commence- nt of the action (R.55-61, 83-103). The affidavit filed behalf of the taxpayer in opposition to the motion for mary judgment in this action relating to the years 1951 rough 1952 (R.63-74) and the subsequent pleadings in ta Cruz Portland Cement Co. v. United States, No. 41063, in lower court relating to the years 1953 through 1956 pendix A) raise an issue as to the validity of that election. allegations of taxpayer that the election is not valid ause it was filed as a result of several material mistakes fact and law raise genuine issues of material fact, such its knowledge and reliance, which taxpayer is entitled to ablish upon trial. This Court has repeatedly held that

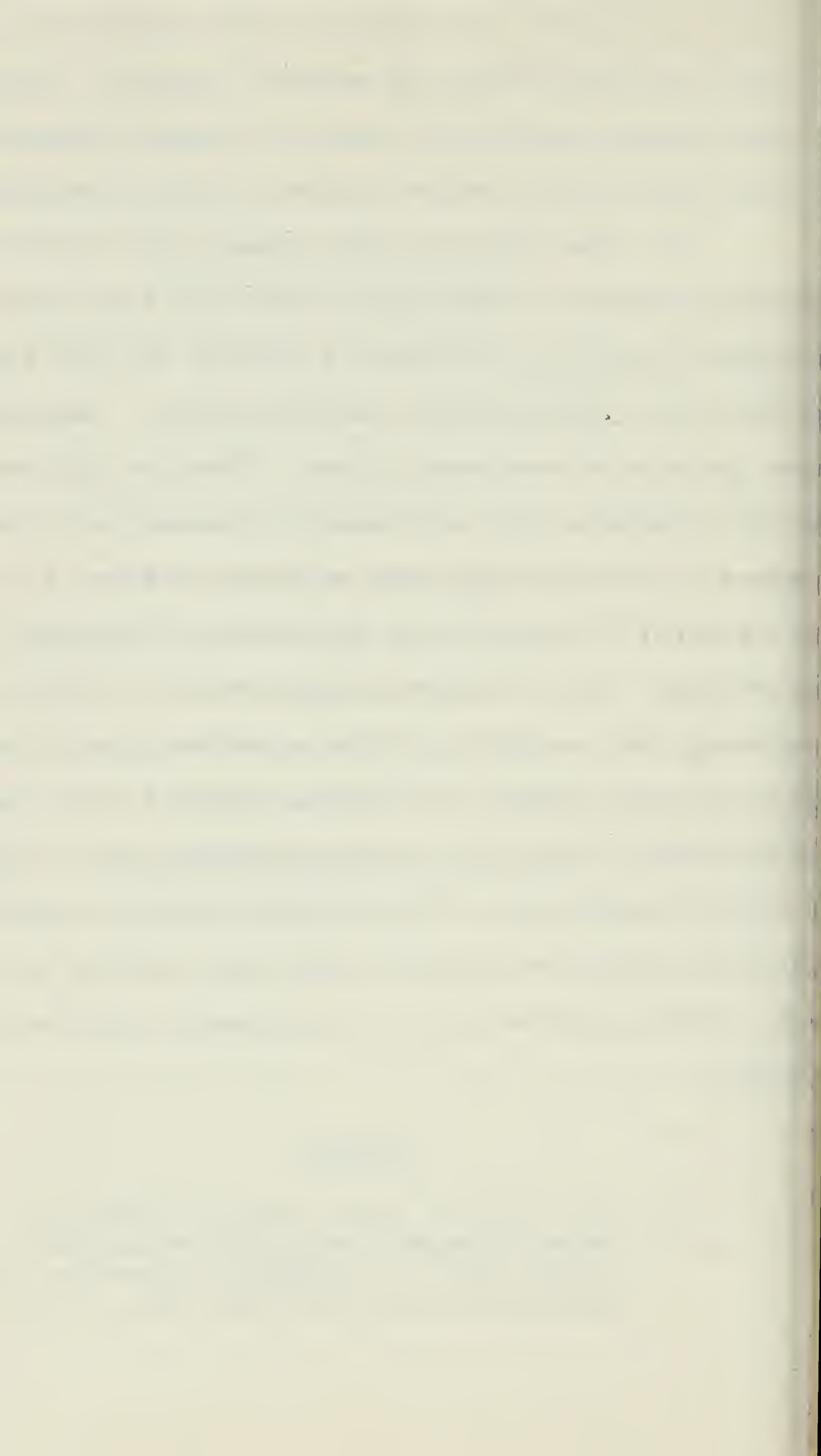


al doubts as to the existence of such issues must be resolved aainst the party moving for summary judgment. The existence o such issues preclude the entry of summary judgment pursuant t Rule 56(c) of the Federal Rules of Civil Procedure.

2. The District Court abused its discretion in rfusing taxpayer a continuance until all the facts could be dveloped relating to taxpayer's mistake of fact and law in etering the election under Section 302(c). Subsequently, tose facts have been established. When the Internal Revenue Srvice repudiated the settlement agreement and disallowed the taxpayer's net operating loss carryback claims, it was obvious tht taxpayer's election had been made on the basis of a mistake of fact. The identical issues raised in this action cncerning the invalidity of the election under those circumstnces are now before the District Court for the years 1953 through 1956 in Santa Cruz Portland Cement Co. v. United States, No 41063 (Appendix A). This action should be remanded to tht court and joined with the case now pending so that the curt can have before it all of the years involved in the lection.

ARGUMENT

1. The District Court Erred in Granting Summary Judgment and Dismissing the Action on the Basis of Taxpayer's Election, the Validity of Which Is Disputed.



(a) The Affidavit Filed in Opposition to the Government's Motion for Summary Judgment and the Pleadings in the District Court Raise Genuine Issues of Material Fact Concerning the Validity of Taxpayer's Election Which Cannot Be Decided by Summary Judgment.

A summary judgment may only be entered "if the leadings, depositions, and admissions on file, together with he affidavits, if any, show that there is no genuine issue s to any material fact and that the moving party is entitled o a judgment as a matter of law." (Rule 56(c), Federal Rules f Civil Procedure.) The District Court erred in granting ummary judgment in this action because the affidavit filed n the court below on behalf of taxpayer in opposition to the overnment's motion for summary judgment in this action for ne years 1951 and 1952 (R.63-74) and the complaint filed in anta Cruz Portland Cement Co. v. United States, No. 41063 Appendix A) in that same court for the years 1953 through 956, of which this Court may take judicial notice*, raise enuine issues of material fact concerning the validity of tax-ayer's election covering all the years 1951 through 1956. axpayer alleges that the election under Section 302(c) of the ublic Debt and Tax Rate Extension Act, as amended, is invalid nd not binding because it was made as the result of and in eliance on several material mistakes of fact and law.

Taxpayer relied on the Commissioner's published

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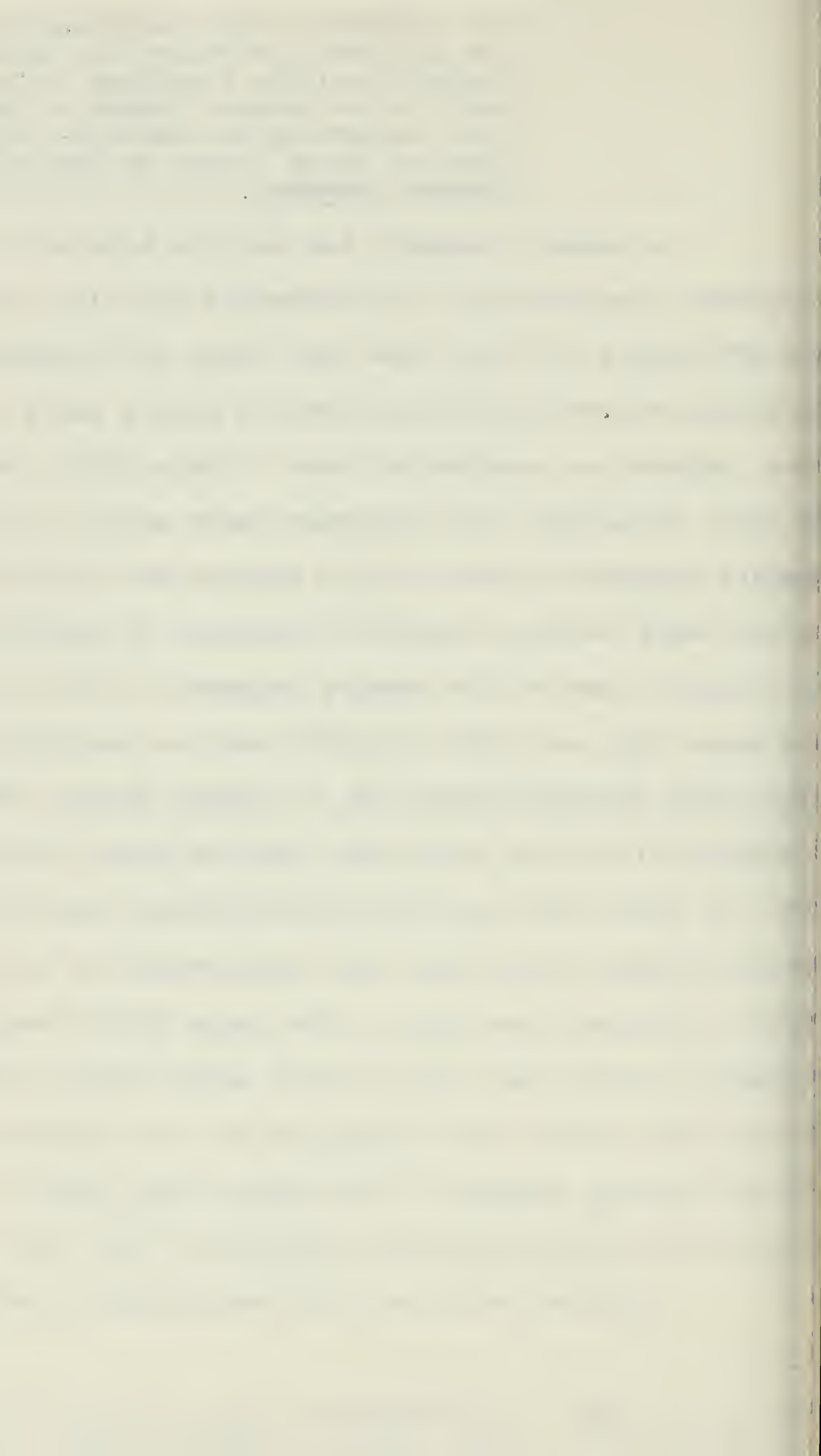
*See, e.g., Zahn v. Transamerica Corp., 162 F.2d 36 at page 48 ote 20 (3rd Cir. 1946); Wells v. United States, 318 U.S. 257, 60 (1943); Lowe v. McDonald, 221 F.2d 228, 230-31 (9th Cir. 1955).



acquiescence in the Acampo decision (R.65-67). That published acquiescence (Appendix C) which served as a policy guide for the Internal Revenue Service and the public, including taxpayer, resulted in the settlement agreement with the Internal Revenue Service which allowed a refund to taxpayer for net operating losses for the years 1957, 1958 and 1959 carried back to 1955 and 1956 (R.67-68). Subsequently, that acquiescence was withdrawn (Appendix E) and that agreement was repudiated (Appendix B). Thus, taxpayer made a mistake of fact in relying on the Commissioner's acquiescence in the Acampo decision when it filed the election in order to enter into the settlement agreement.

Taxpayer relied on the proposition that the election was necessary in order to prevent the Internal Revenue Service from claiming that taxpayer's depletion deductions for 1951 through 1956 were excessive and the resulting deficiencies could be offset against refunds for the net operating losses in 1957, 1958 and 1959, even though the statute of limitations barred the assertion of a deficiency by the Internal Revenue Service for those years (R.66-69). The reason taxpayer thought the election was necessary was its belief that the Cannelton decision was applicable to the cement industry, and the published statement of the Commissioner of Internal Revenue that he would apply the principle of the Cannelton case to any cement company which did not make the election under the Public Debt and Tax Rate Extension Act. (Revenue Ruling 60-320, 1960-2 Cumulative Bulletin 198; Appendix D.) If the principle of the Cannelton

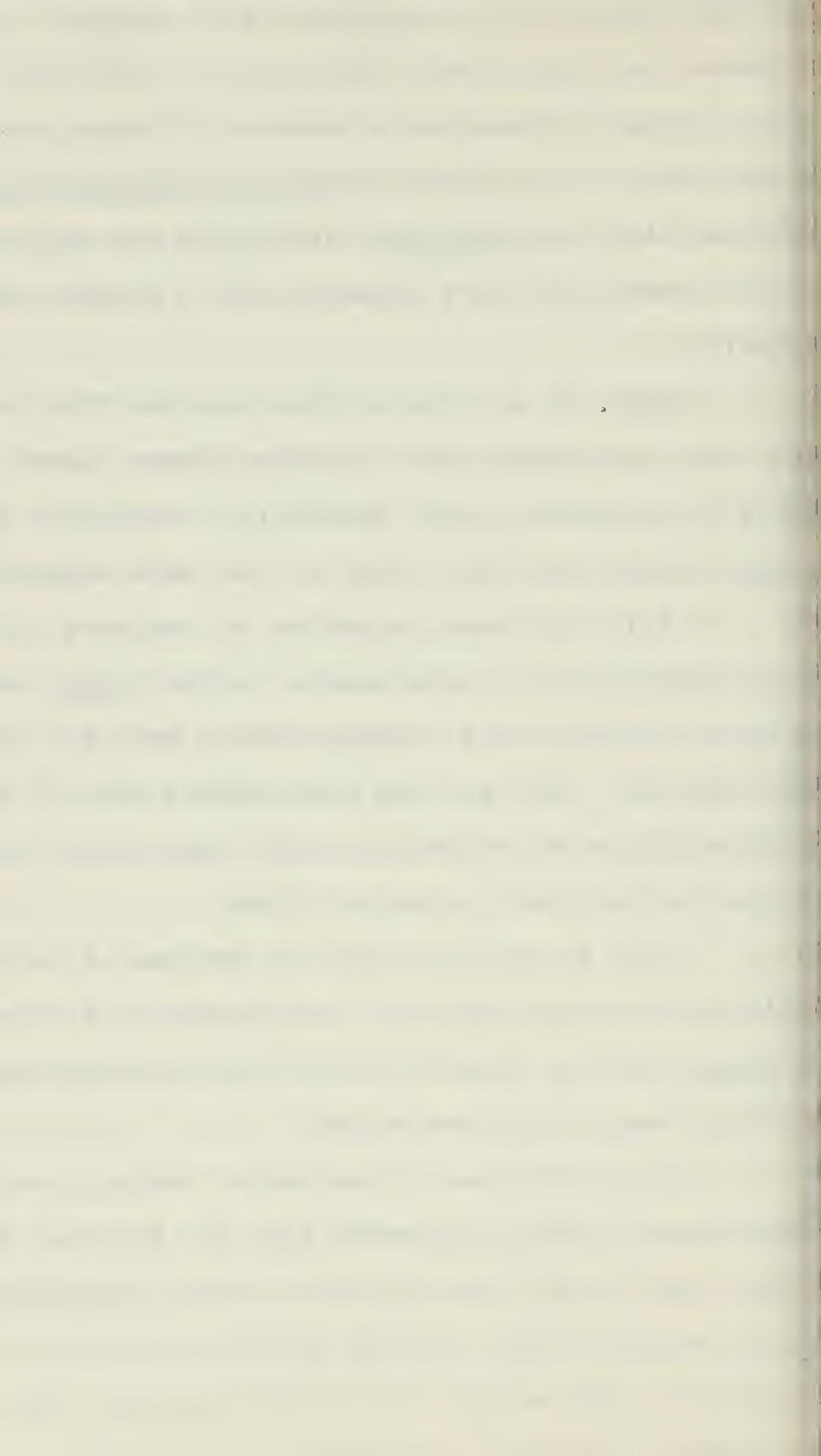
ase were applied, it was possible that taxpayer's depletion llowance for 1951 through 1956 might be less even than the mount claimed in taxpayer's returns for those years (R.69). he decision of this Court in Monolith Portland Cement Co. ndicates that the Cannelton decision is not applicable to the ement industry and that taxpayer made a mistake of law R.69-70).

Thus, on a trial of this case the District Court ould have to consider the following issues, among others, in aking its decision on the question of revocation of the lection under the Public Debt and Tax Rate Extension Act:

(1) Did those in control of taxpayer actually rely n the Commissioner's acquiescence in the Acampo case in making their decision that taxpayer should make the election nder the Act? That is, did they believe that by making the lection they were protecting claims upon which they were ntitled to receive a refund of taxes?

(2) If so, were those in control of taxpayer ustified in relying upon the Commissioner's acquiescence in he Acampo case as applied to the facts surrounding the net perating loss claims for refund?

(3) Did those in control of taxpayer rely on the ommissioner's public statement that the Internal Revenue ervice would apply the principles of the Cannelton case to ement companies which did not make the election, and did hey believe that unless the election was made the Service ould offset potential deficiencies relating to excessive



depletion deductions against refunds under the net operating loss claims?

(4) Did those in control of taxpayer actually believe that the principles of the Cannelton case were applicable to taxpayer's depletion deductions upon its returns?

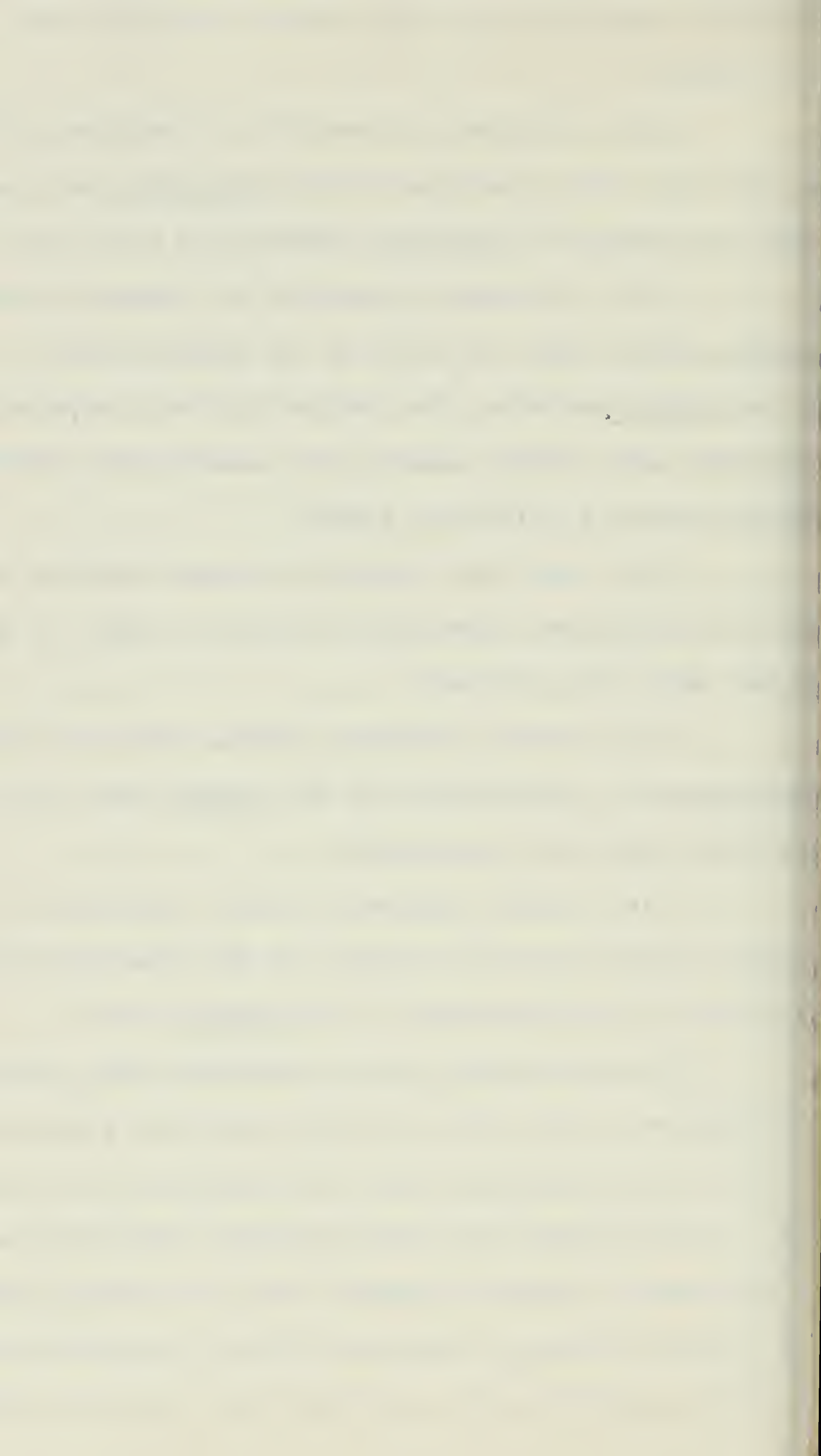
(5) Did those in control of taxpayer have reasonable grounds, other than the fact of the Commissioner's acquiescence in the Acampo decision, for believing that taxpayer's net operating loss refund claims were claims upon which taxpayer could receive a refund of taxes?

(6) Would the Internal Revenue Service have entered into the settlement agreement of July 6, 1961, if taxpayer had not made the election?

(7) Did the Internal Revenue Service rely on the Commissioner's acquiescence in the Acampo case in entering into that settlement agreement?

(8) Was the agreement later repudiated by the Internal Revenue Service because of the Commissioner's withdrawal of his acquiescence in the Acampo case?

The government has not admitted that taxpayer made the election on the basis of those material mistakes of fact and law and undoubtedly would put taxpayer to its proof on trial. The attorney for the government indicated as much at the hearing for summary judgment when he stated that there were "certain factual problems with the alleged mistake in the first place" (R.117, ll. 9-10) and seemed to suggest taxpayer had not in fact relied on the mistakes of fact and law

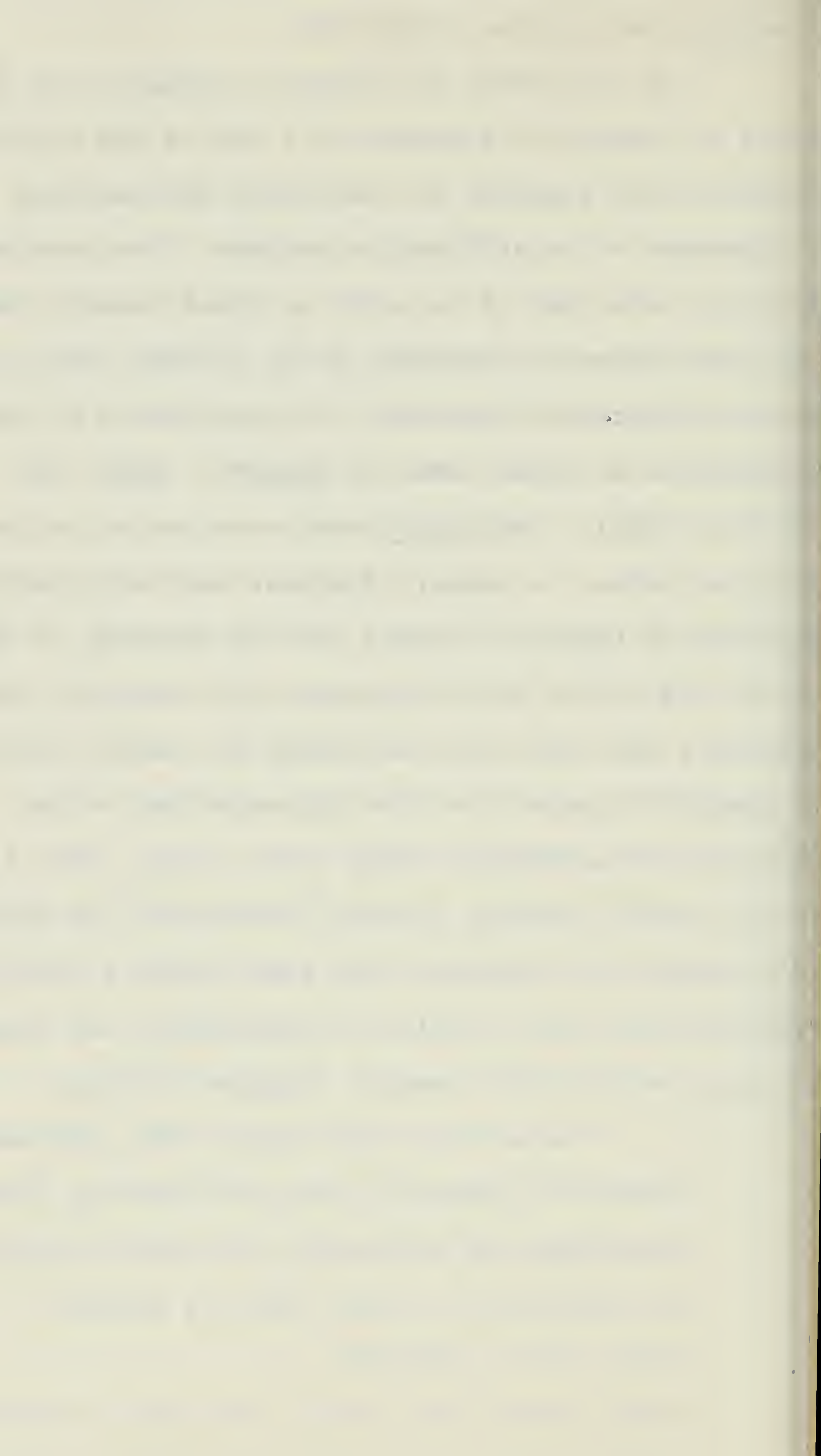


n making the election (R.117-20).

In its motion for summary judgment, the government relied on taxpayer's election as a bar to the action. In principle this argument is comparable to asserting a release or agreement as an affirmative defense. The courts have consistently held that it is error to grant summary judgment in such cases where the opposing party alleges facts contending that the release or agreement is inapplicable or invalid. Illustrative of these cases is Girard v. Gill, 261 F.2d 695 (4th Cir. 1958). The Girard case was also an action for the refund of taxes. A summary judgment had been granted to the Collector of Internal Revenue who had asserted as a defense that he had relied on an agreement with taxpayer in which statements were made that no claims for refund would be made. The plaintiff denied that the Collector had relied on the agreement and contended, among other things, that the agreement was not binding because certain assessments had been made by the Collector to intimidate him into making a settlement more favorable than that to which the government was entitled. The court reversed the summary judgment stating:

> "We hold on this record that genuine issues of material fact are raised by the pleadings and affidavits, on which taxpayer is entitled to a jury trial as prayed."
>
> (261 F.2d at 699-700.)

Other courts have either reversed or denied summary judgments when the validity of a release was disputed.



Schwartzberg v. Beranc,

274 F.2d 165 (4th Cir. 1960)

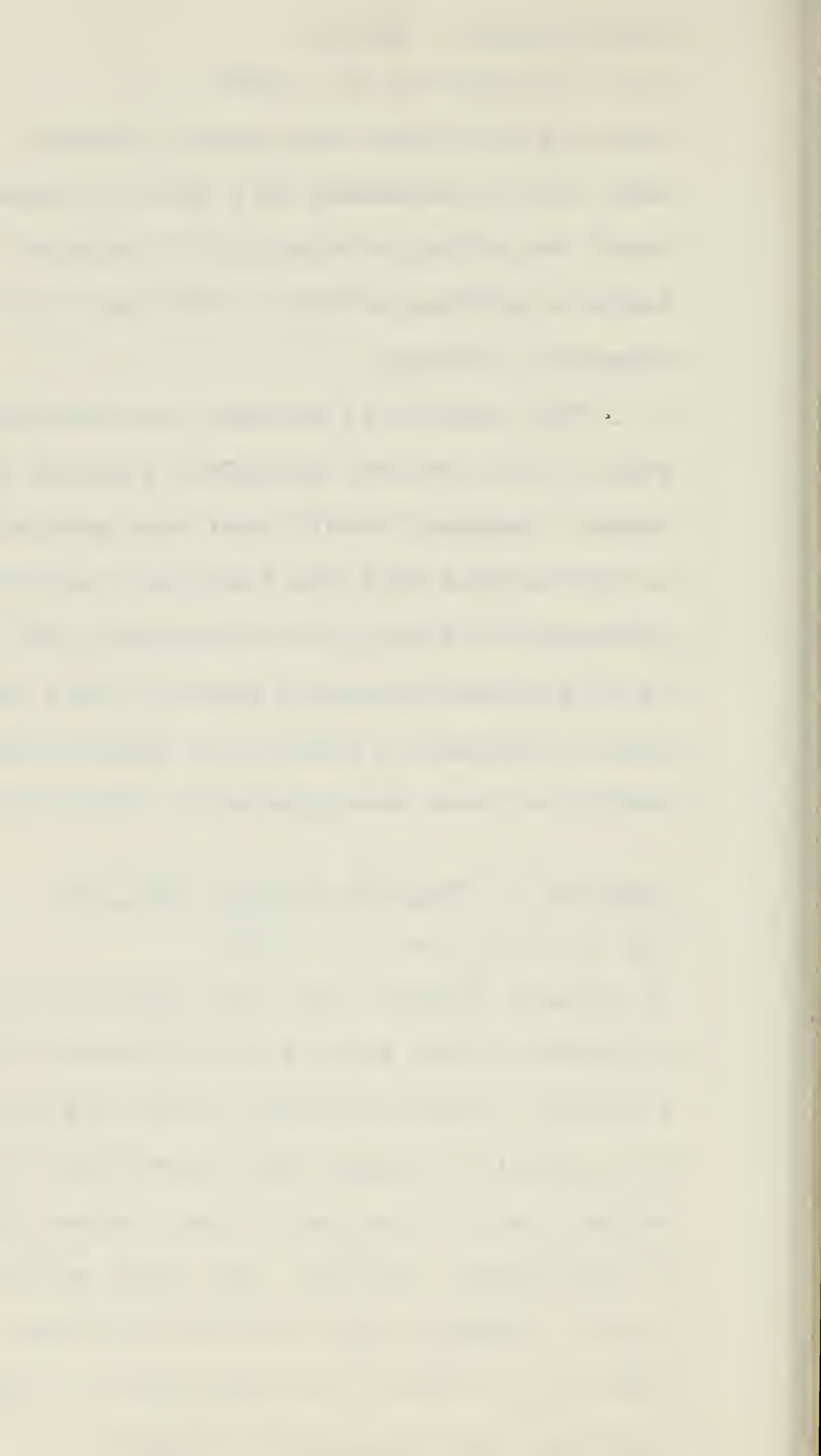
(The District Court had granted summary judgment for the defendant in a suit to reopen and avoid the effect of plaintiff's release on the basis of mistake of fact. The Court of Appeals reversed, stating:

"The problem is whether, on the present state of the record, defendant's motion for summary judgment should have been granted. We do not believe that the facts are sufficiently developed to justify the conclusion that there is no genuinely disputed issue of fact and, hence, defendant's motion for summary judgment should not have been granted." (274 F.2d at 167.));

Camerlin v. New York Central R.R. Co.,

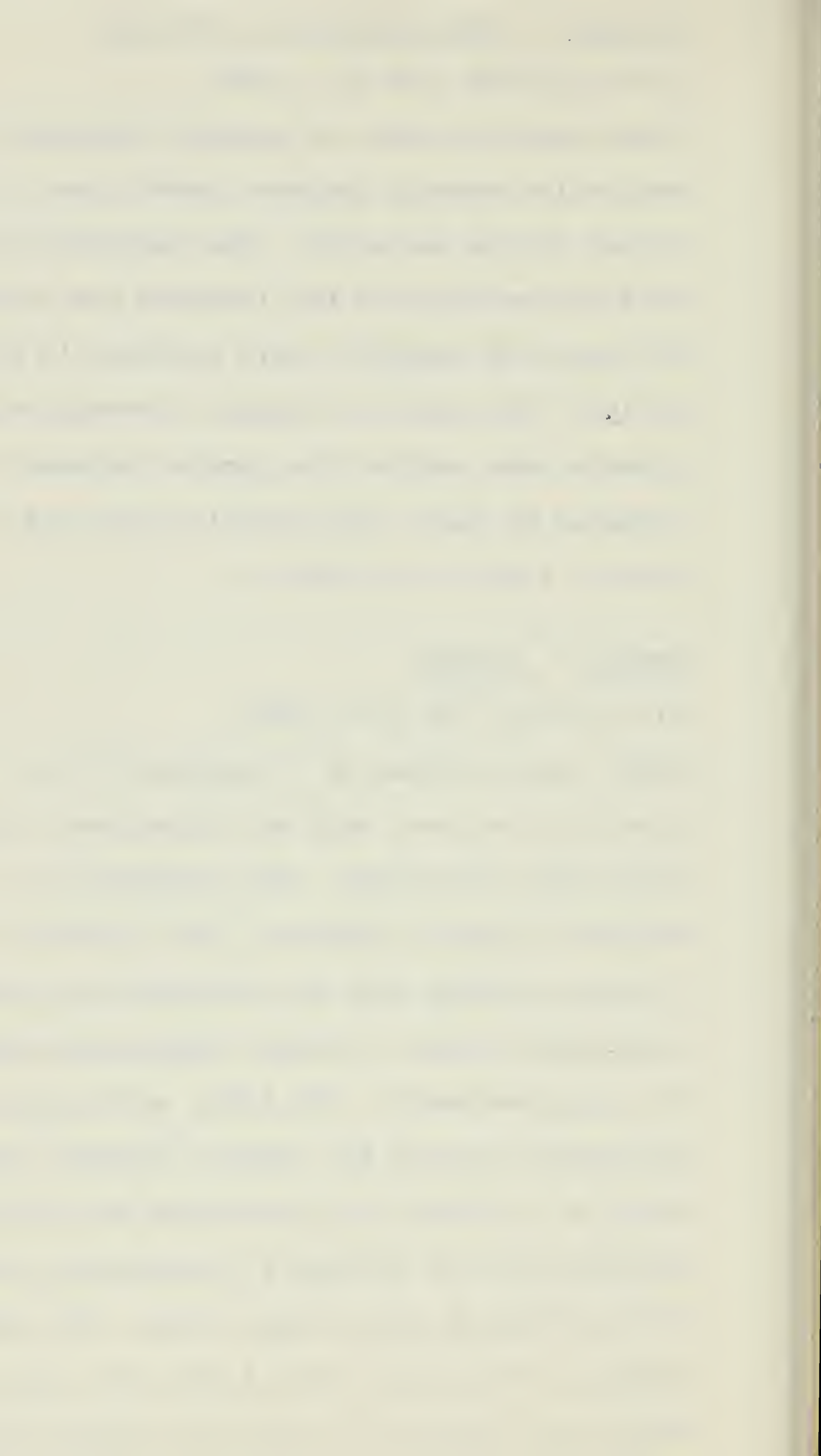
199 F.2d 698 (1st Cir. 1952)

(A summary judgment had been granted to the defendant on the basis of its defense based on a general release executed by the plaintiff. The plaintiff alleged facts upon which he contended that as a matter of law, he was not bound by the general release. The court reversed the summary judgment with an indication that the plaintiff be given the opportunity to establish the facts invalidating the release.);



Butcher v. United Electric Coal Co.,
174 F.2d 1003 (7th Cir. 1949)
(The District Court had granted defendant's motion for summary judgment based upon a release signed by the plaintiff. The plaintiff alleged that the parties had not intended the release to cover the specific claim involved in the action. The Court of Appeals reversed on the grounds that whether the general release was intended to cover the specific claim was a question of fact to be tried.);

Downey v. Palmer,
114 F.2d 116 (2d Cir. 1940)
(This was an action by a receiver of an insolvent national bank on indebtedness arising from stock assessment. The defendant as a defense alleged a release. The plaintiff filed a reply alleging that the release was void and rescinded because of false representations made in its procurement. The trial court granted the defendant's motion for summary judgment on the basis of a statute of limitations but without prejudice to the plaintiff instituting a new action based on the alleged fraud. The Court of Appeals reversed and stated that the plaintiff should be permitted to amend its complaint alleging the fraud in obtaining the release and

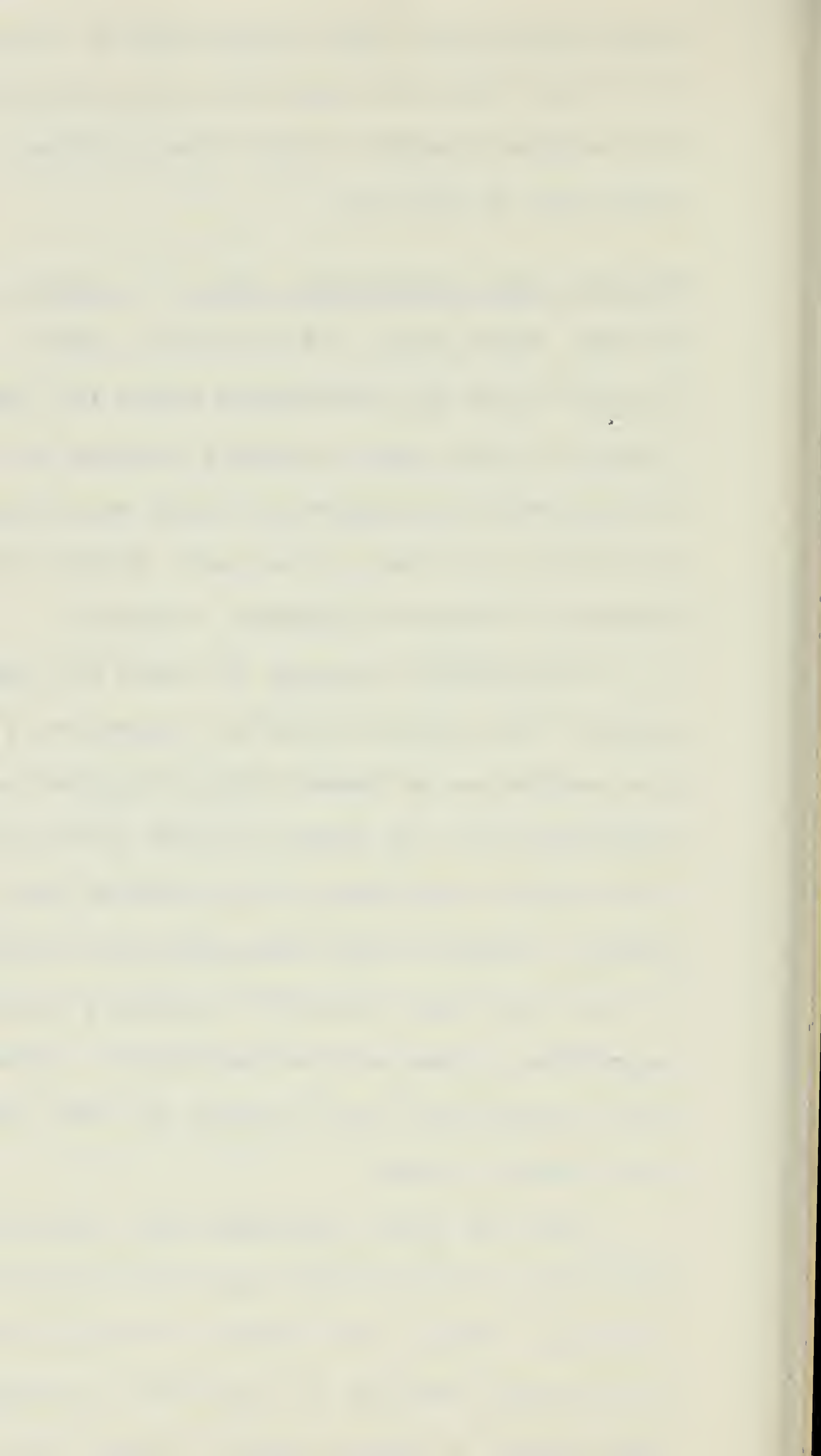


also stated that "the allegations of fraud in the reply raise an issue as to the validity of the release pleaded as the first defense." (114 F.2d at 117.));

Michael Rose Productions, Inc. v. Loew's Inc., 22 Fed. Rules Serv. 754 (S.D.N.Y. 1956) (In this case the defendants moved for summary judgment based upon a general release which the plaintiff attempted to avoid on the grounds of mistake or fraud. The court denied the motion for summary judgment, stating:

"Plaintiff's attempt to avoid its general release thus poses issues of subjective fact. The resolution of those issues requires an exploration of the state of mind of the plaintiff and the defendants who received plaintiff's general release--their knowledge and intention at the time that plaintiff's general release was negotiated, executed and delivered. Moreover, their credibility with respect to such testimony is a crucial issue.

State of mind, knowledge and intention can generally be established only by circumstantial evidence. Hence, the ultimate findings of fact--as to mutual mistake or unilateral mistake and fraud--must be based primarily upon inferences to be drawn from testimony whose probative value

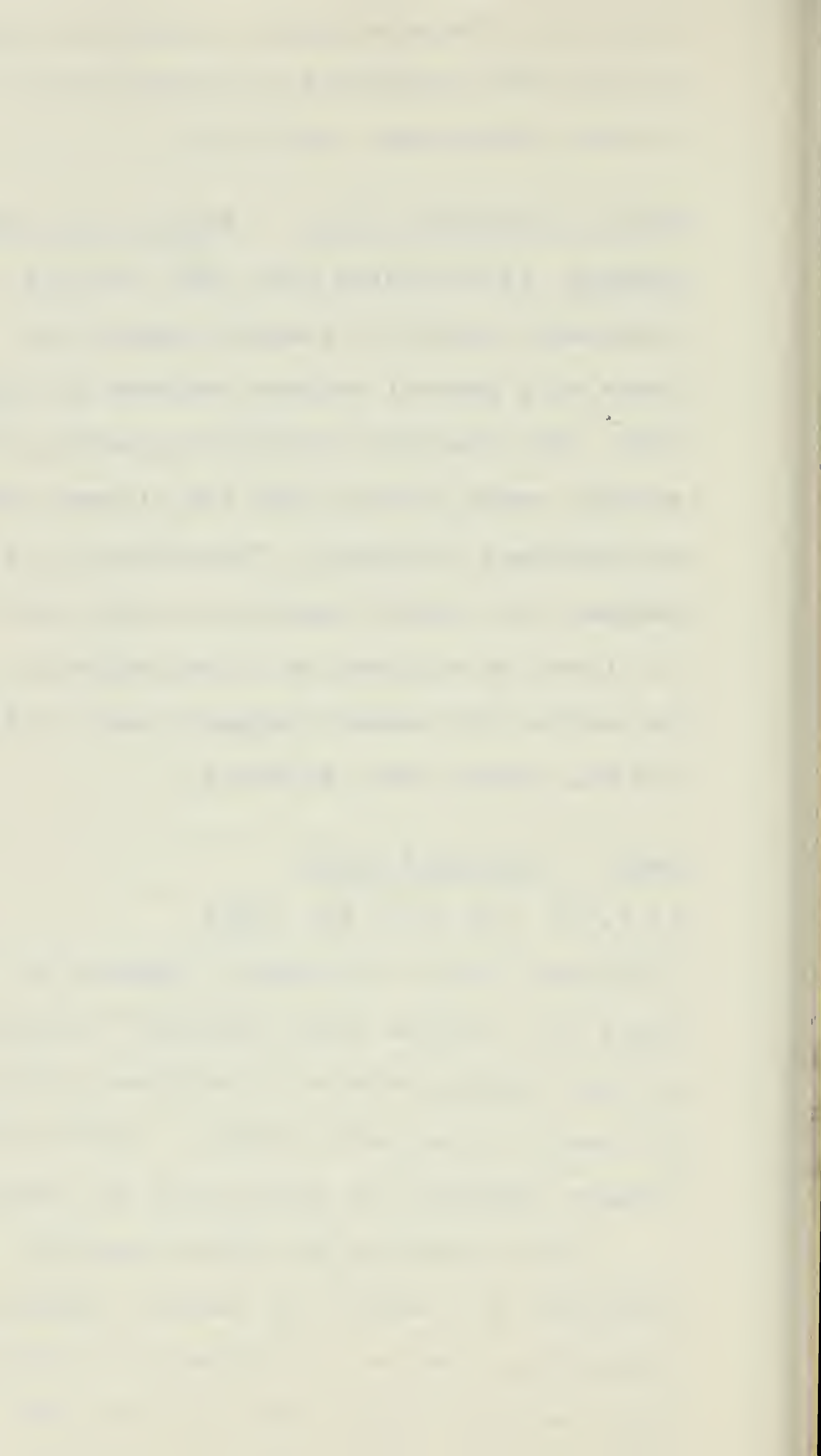


should be determined upon a courtroom trial, and not mere affidavits and depositions." (22 Fed. Rules Serv. at 755.));

Empire Industries, Inc. v. Mastic Tile Co. of America, 19 Fed Rules Serv. 887 (S.D.N.Y. 1954) (Defendant moved for summary judgment on the basis of a general release executed by the plaintiff. The plaintiff opposed the motion on the ground, among others, that the alleged release was obtained by duress. The motion for summary judgment was denied because, as the court said, "if there is an issue as to any material fact the motion for summary judgment must be denied." (19 Fed. Rules Serv. at 887.));

Lane v. Greyhound Corp.,
13 F.R.D. 178 (E.D. Ky. 1952)
(Defendant moved for summary judgment on the basis of a release which plaintiff contended was not binding because it had been procured by fraud, duress and coercion. The motion for summary judgment was denied with the observation:

"In considering the narrow question thus presented by a motion for summary judgment, the authorities seem to be unanimous in holding that the court should take the view most favorable to the party against whom the motion is



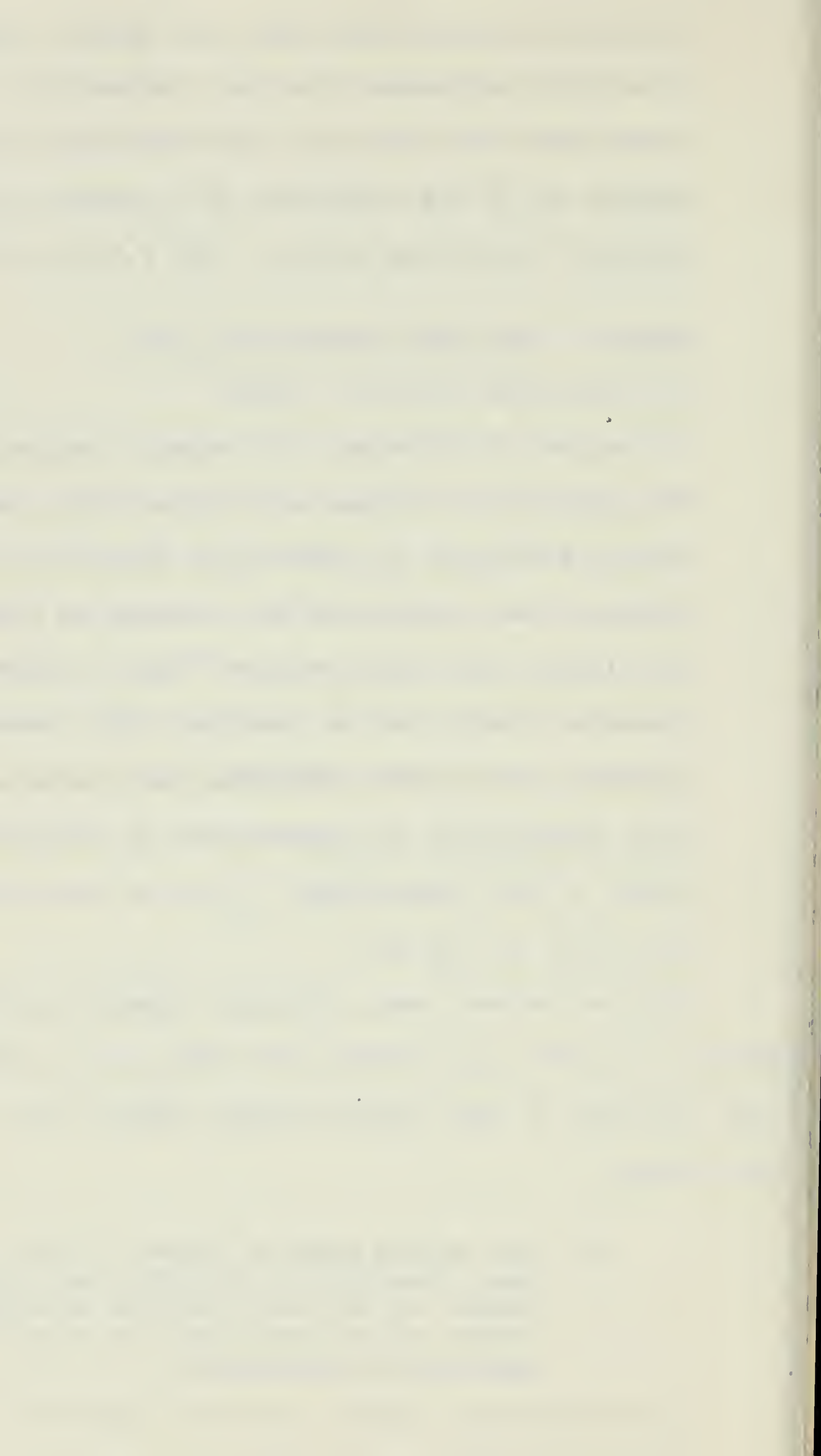
directed, giving that party the benefit of all favorable inferences that may reasonably be drawn from the evidence, and resolving all doubts as to the existence of a genuine issue against the moving party." (13 F.R.D. at 179.));

Mason v. New York Central R.R. Co., 8 F.R.D. 637 (W.D.N.Y. 1949) (A motion of defendant for summary judgment on the basis of a release was denied when plaintiff's affidavit in opposition raised the question of the validity of the release on grounds of mistake and fraud because "such a substantial question should not be resolved upon procedural grounds nor without affording the plaintiff full opportunity to demonstrate by evidence the basis of his contentions, if he be so advised." (8 F.R.D. at 637.)).

In the instant case, taxpayer should be afforded the pportunity to prove by evidence the basis of its contentions ht the election it made under Section 302(c) was invalid n not binding.

(b) The Record Must Be Viewed in the Light Most Favorable to Taxpayer and All Doubts as to the Existence of Genuine Issues of Material Fact Must Be Resolved Against the Government.

In determining whether there are genuine issues f material fact, the record, including the pleadings and



the affidavit filed on behalf of taxpayer in opposition to the motion for summary judgment, must be viewed in the light most favorable to taxpayer. This Court stated the rule in Carr v. City of Anchorage, 243 F.2d 482 (9th Cir. 1957):

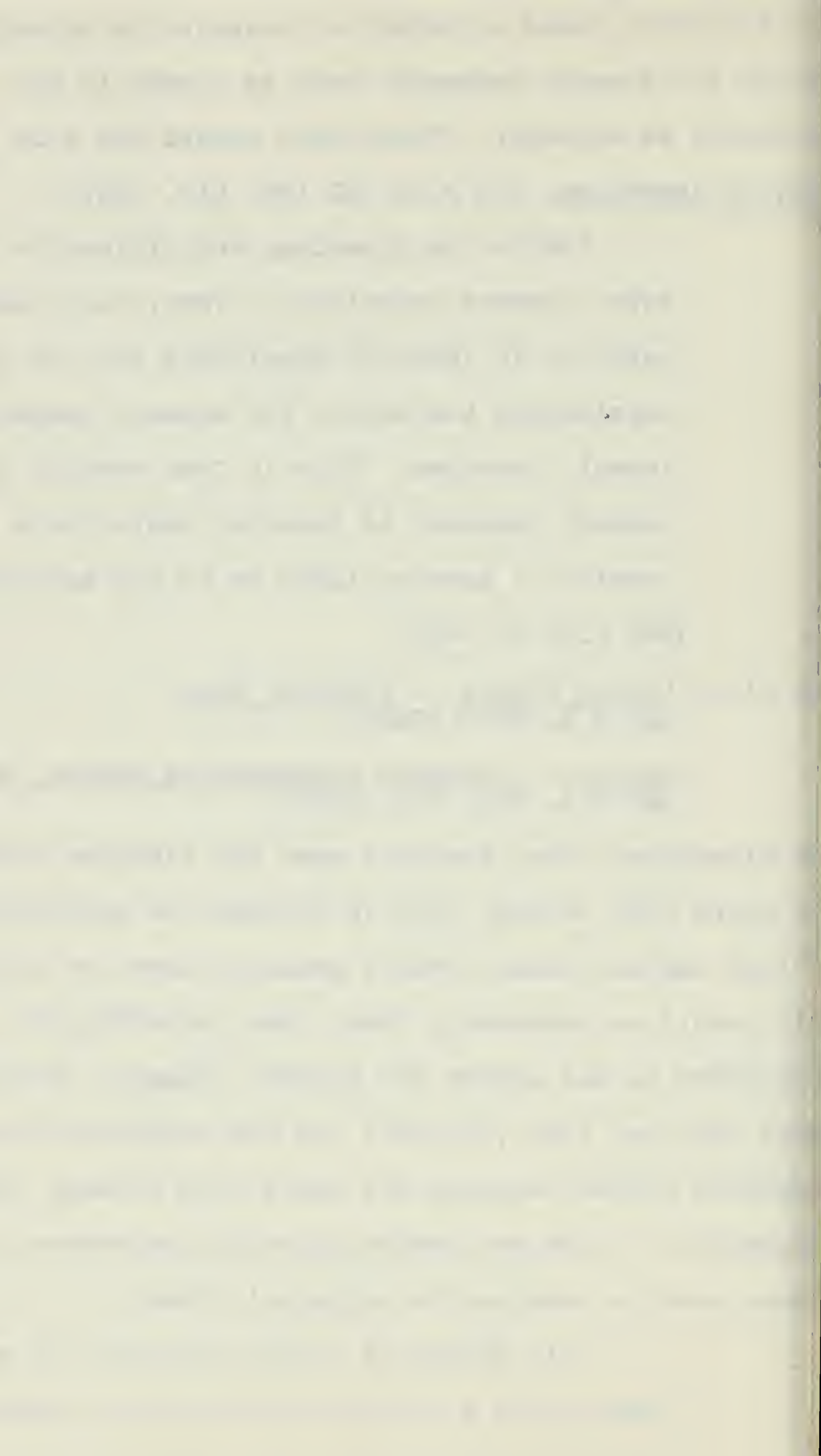
> "While the pleadings and affidavits raise certain disputed questions of fact, they must all be resolved in favor of appellants for the purpose of considering the motion for summary judgment and the appeal therefrom. This is true because a motion for summary judgment is improper where there is left unresolved a genuine issue as to any material fact." (243 F.2d at 483.)

See also, United States v. Diebold, Inc., 369 U.S. 654 (1962);

Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962).

The allegations that taxpayer made the election affecting the tax years 1951 through 1956 in reliance on material mistakes of fact and law raise several genuine issues of material fact. This should be abundantly clear from the affidavit filed in opposition to the motion for summary judgment covering the years 1951 and 1952 (R.63-74) and the complaint filed in the companion action covering the years 1953 through 1956 (Appendix A). But any doubts as to the existence of such issues must be resolved in taxpayer's favor.

> "All doubts as to the existence of a genuine issue as to a material fact must be resolved



against the party moving for a summary judgment." Cameron v. Vancouver Plywood Corp., 266 F.2d 535, 540 (9th Cir. 1959).

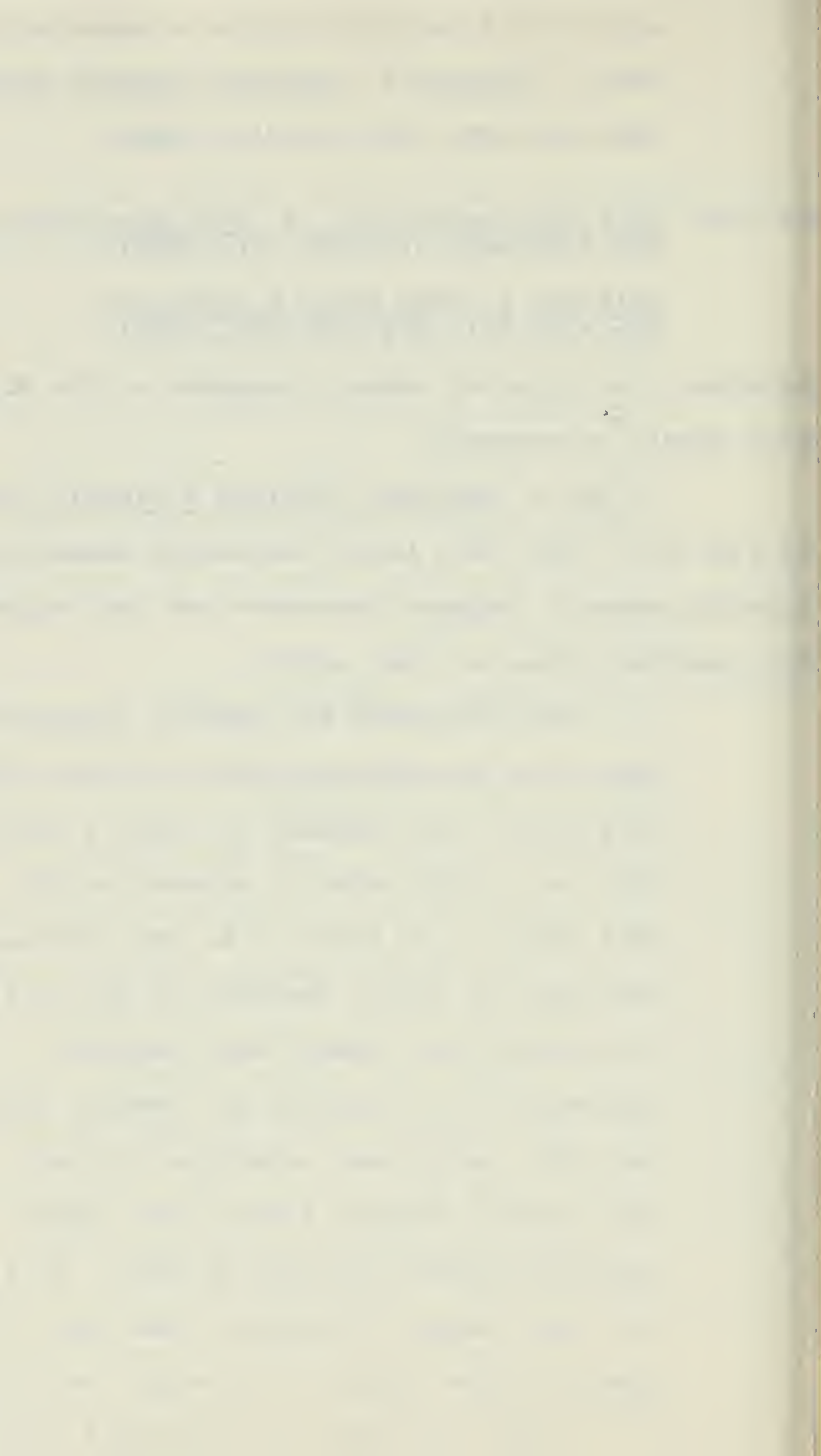
See also, Neff Instrument Corp. v. Cohu Electronics, Inc., 269 F.2d 668, 674 (9th Cir. 1959);

Griffeth v. Utah Power & Light Co., 226 F.2d 661, 669 (9th Cir. 1955).

Therefore, the order of summary judgment of the District Court below should be reversed.

In Cox v. American Fidelity & Casualty Co., 249 F.2d 616 (9th Cir. 1957) this Court succinctly summarized the law regarding summary judgment procedure and its inapplicability when possible issues of fact exist:

> "The procedure for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, 28 U.S.C.A. was intended to avoid a useless trial, that is, a trial when it appears on the record that there is no issue as to any material fact, and there is only a question of law as to whether the moving party should have judgment. When confronted with a motion for summary judgment, the trial judge must determine if there are any material factual issues that should be resolved before the trier of fact. It is not the trial judge's function, under Rule 56, to resolve those issues or to weigh the evidence. . . . 'Rule 56 should be cautiously invoked to



the end that parties may always be afforded a trial where there is a bona fide dispute of facts between them.'. . .

The summary judgment procedure under Rule 56 has been widely commented upon by all the circuits, but perhaps the best statement on the applicability of the rule was made by the late Judge Jerome Frank of the Second Circuit, when he elaborated on the 'slightest doubt' rule enunciated by the First Circuit as follows:

> 'We take this occasion to suggest that trial judges should exercise great care in granting motions for summary judgment. A litigant has a right to a trial where there is the slightest doubt as to the facts, and a denial of that right is reviewable; but refusal to grant a summary judgment is not reviewable. Such a judgment, wisely used, is a praiseworthy time-saving device. But, although prompt dispatch of judicial business is a virtue, it is neither the sole nor the primary purpose for which courts have been established. Denial of a trial on disputed facts is worse than delay. . . . The district courts would do well to note

that time has often been lost by reversals of summary judgments improperly entered. Doehler Metal Furniture Co. v. United States, 149 F.2d 130, 135." (Emphasis added.) (249 F.2d at 618.)

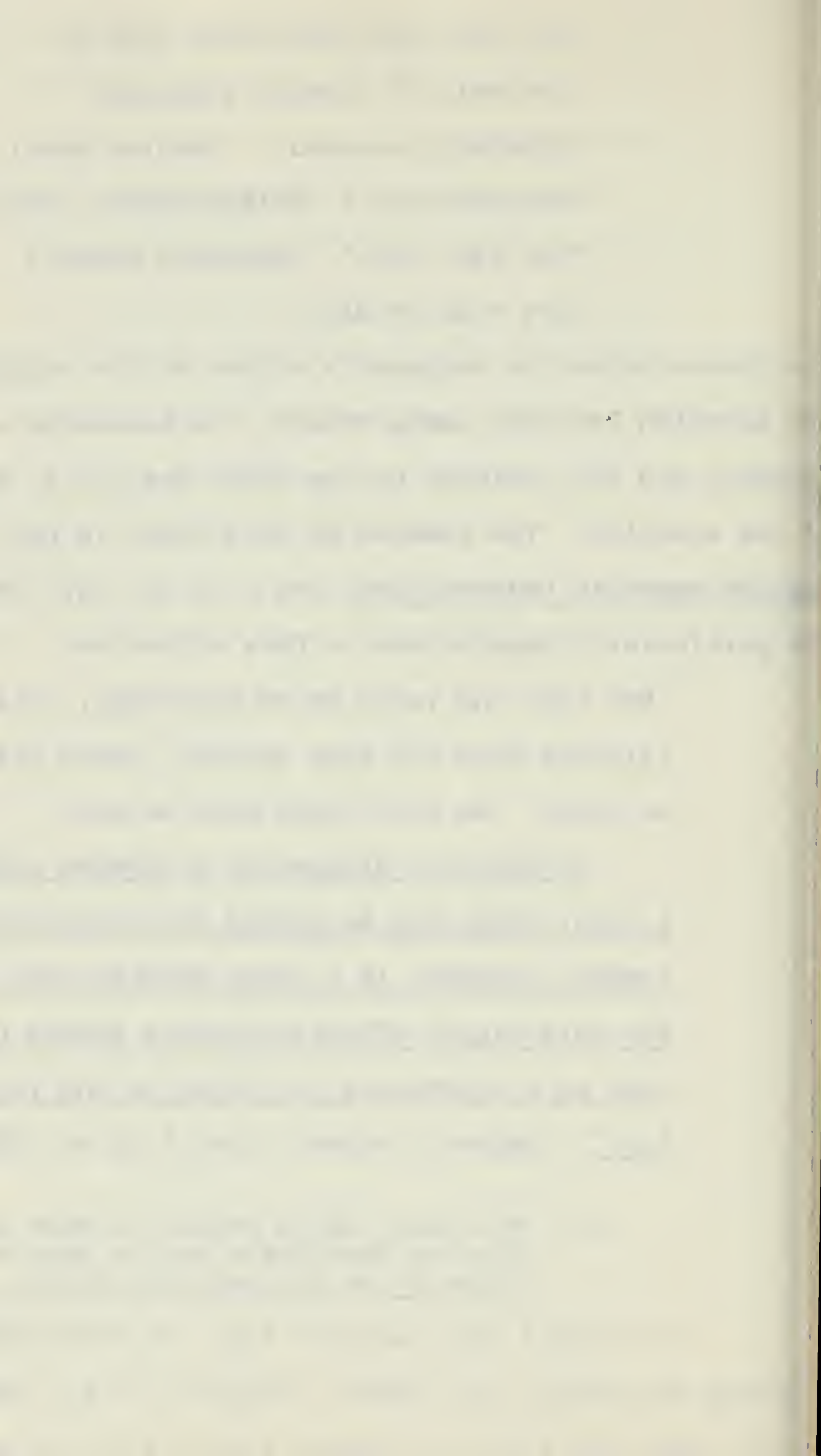
he issues raised by taxpayer's attack on the validity of he election include, among others, the knowledge of the axpayer and its reliance on the facts and law at the time f the election. The remarks of this Court in Cox v. nglish-American Underwriters, 245 F.2d 330 (9th Cir. 1957), re particularly appropriate to this situation:

"But here the facts as to knowledge, intent and reliance have not been proved. There has been no trial. We hold there must be one.

In haste to dispose of a crowded calendar, a trial judge may be misled into believing a summary judgment is a quick solution for a problem. But this highly effective device should not be used as a substitute for trial on the facts and law." (Emphasis added.) (245 F.2d at 330.)

(c) The Court Below Failed to Make a Finding That There Was No Genuine Issue as to Any Material Facts.

It should also be noted that the District Court in granting the motion for summary judgment did not make a finding that there was no genuine issue as to any material facts (R.104). This in itself would be sufficient to require



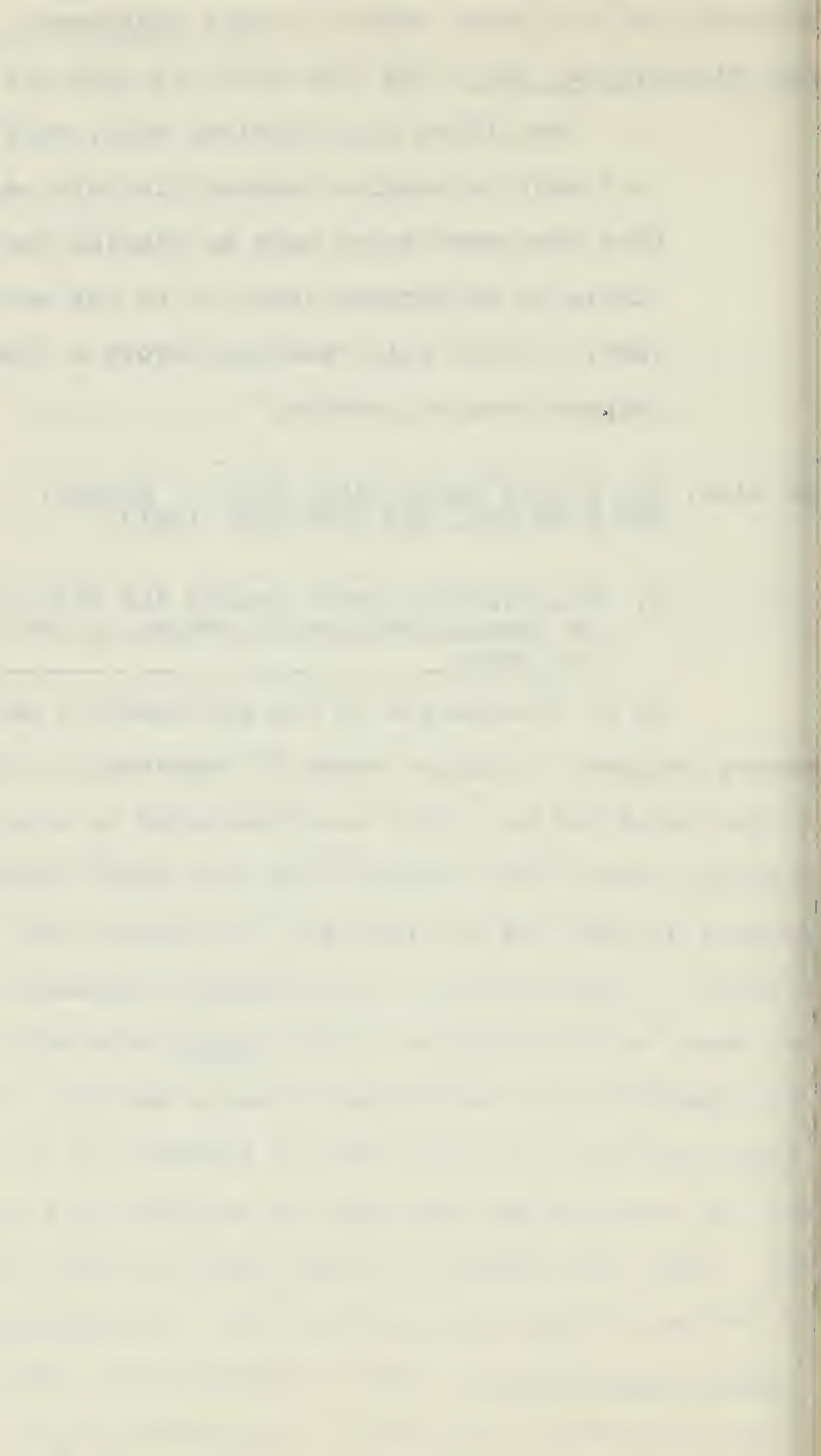
reversal, as this Court stated in Neff Instrument Corp. v. Tohu Electronics, Inc., 269 F.2d 668, 674 (9th Cir. 1959):

> "We affirm the technical rule, sufficient in itself to require reversal in this case, that the court below made no finding that 'there is no genuine issue as to any material fact,' as the rule requires before a summary judgment may be granted."

See also, New & Used Auto Sales, Inc. v. Hansen, 245 F.2d 951, 953 (9th Cir. 1957).

2. The District Court Abused Its Discretion in Denying Taxpayer's Motion to Continue the Case.

As an alternative to the government's motion for summary judgment, taxpayer moved to continue the case because all the facts had not fully been developed in order to determine whether the election had been based upon material mistakes of both law and fact and, therefore, not binding (R.79-81). Specifically, the settlement agreement which had been based on the decision in the Acampo case had not yet been repudiated by the Internal Revenue Service. This made a delay necessary in order for the taxpayer to be certain that the election had been made in reliance on a mistake of fact. Until the Internal Revenue Service acted, taxpayer was unable to fully prepare for trial. In Sutherland Paper Co. v. Grant Paper Box Co., 183 F.2d 926 (3d Cir. 1950), although it did not involve a motion for continuance as an alternative to a motion for summary judgment, the court held that the



trial court had abused its discretion in denying a motion for continuance. The reasons of the court are applicable to the circumstances in this case:

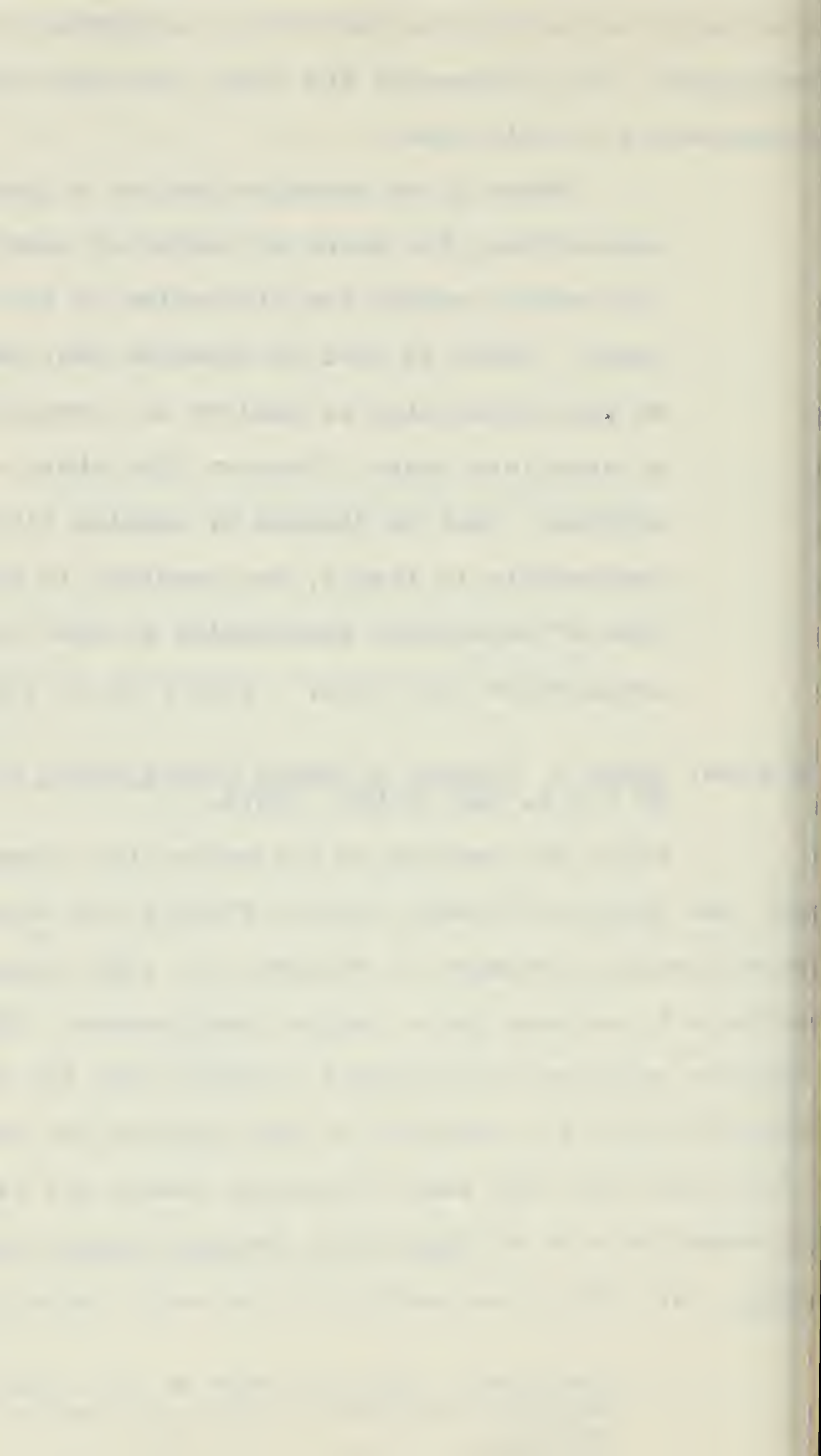
> "There is no question that as a general proposition, the grant or denial of continuances is a matter within the discretion of the trial court. There is also no question that an abuse of that discretion is subject to correction by an appellate court. Here we find abuse of discretion. Zeal to dispose of pending litigation, commendable in itself, has resulted in deprivation of reasonable opportunity to make adequate preparation for trial." (183 F.2d at 931.)

See also, Cohen v. Procter & Gamble Distributing Co., 20 F.R.D. 596 (D. Del. 1957).

After the hearing on the motion for summary judgment, the Internal Revenue Service finally did repudiate the settlement agreement on November 13, 1962 (Appendix B). Now there is no need for a further continuance. The case should be reversed and remanded in order that the issues in connection with the validity of the election can be tried at the same time that these identical issues are tried in the companion case of Santa Cruz Portland Cement Co. v. United States, No. 41063, now pending in the court below. (Appendix A).

3. Taxpayer's Election Made on the Basis of Material Mistakes of Fact and Law Is Not Binding.

The government contends that regardless of whether

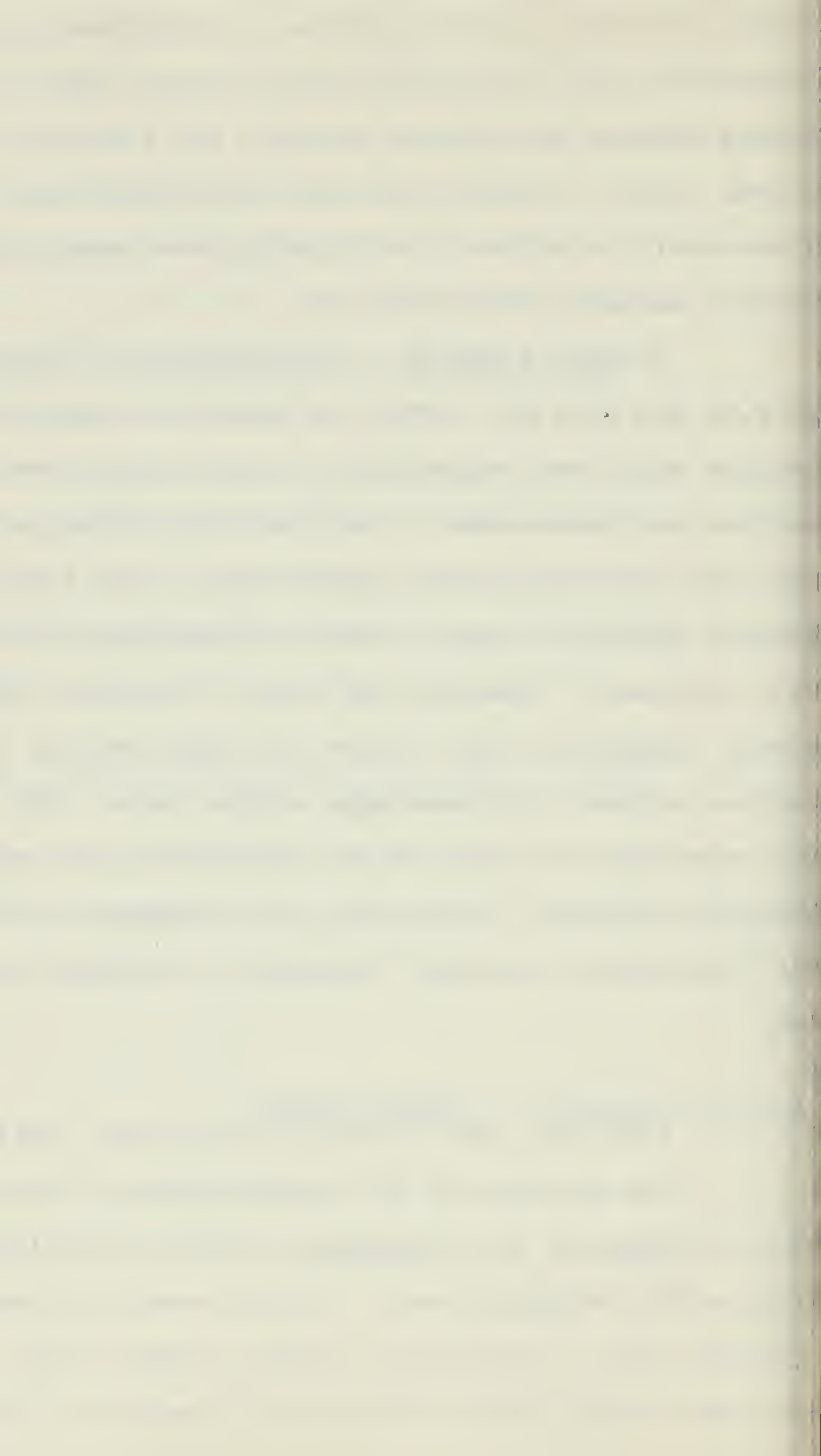


aterial mistakes of fact and law or misrepresentations caused
axpayer to file its election under Section 302(c), it is
inding because the statute provides the election may not be
evoked (R.53). However, the case law establishes that an
irrevocable" election is not binding when made pursuant to
aterial mistakes of fact or law.

In Myer's Estate v. Commissioner of Internal Revenue,
00 F.2d 592 (5th Cir. 1952), the plaintiff taxpayers filed an
lection which the regulations of the Internal Revenue Service
rovided was irrevocable. The plaintiffs attempted to with-
raw their election on the ground that it was based on a
aterial mistake of fact. But the Commission refused to allow
his withdrawal. However, the Court of Appeals for the Fifth
ircuit recognizing that "there is, under settled law, no
lection without full knowledge of the facts" (200 F.2d at
95) ruled that in spite of the validity of the regulation
aking the election irrevocable, the taxpayers could revoke
his "irrevocable election" because of a material mistake of
act.

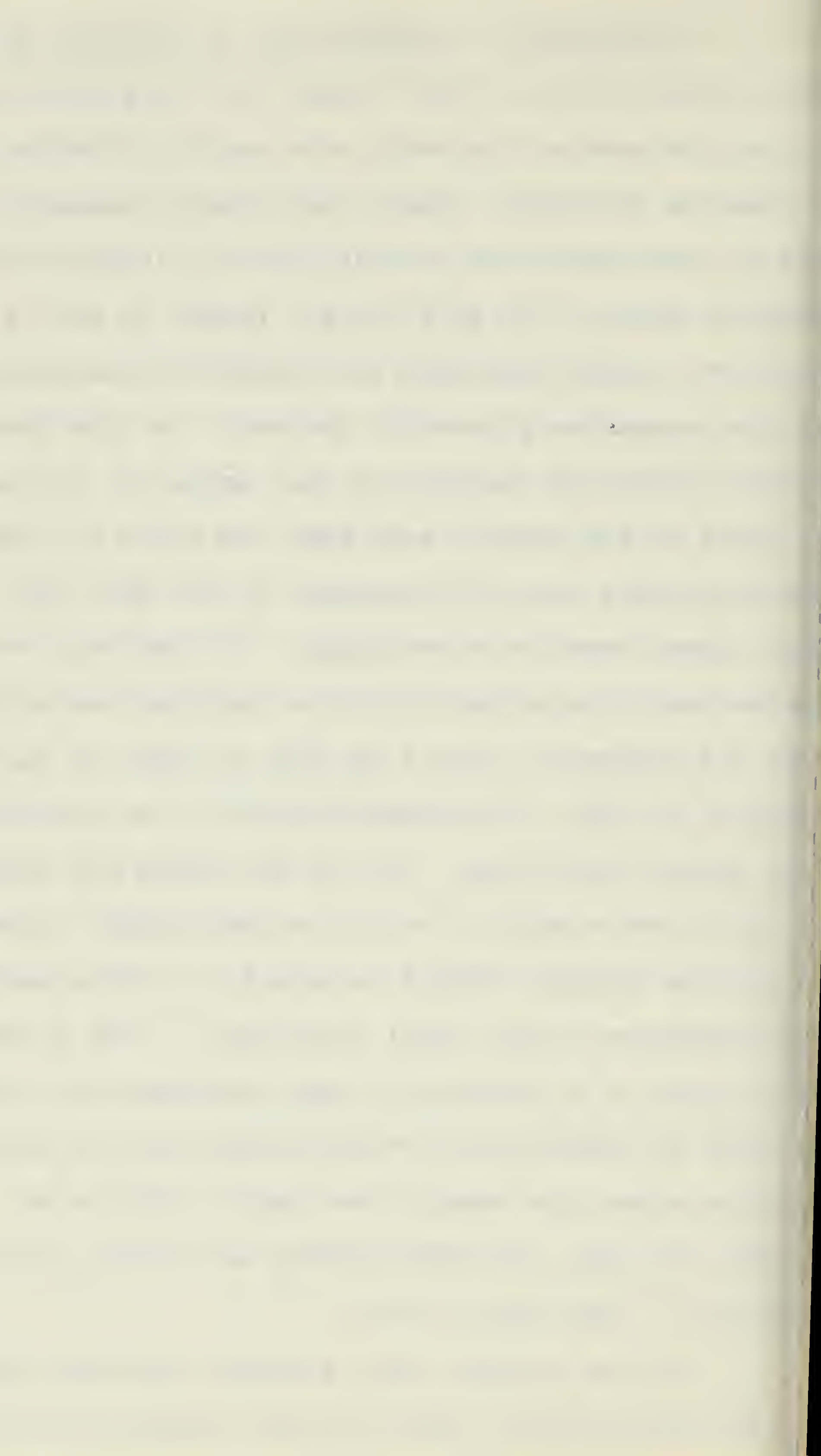
Accord: Cockrell v. United States,
1 Am. Fed. Tax. R.2d 394 (N.D. Tex. 1957).

The position of the Commissioner of Internal Revenue
aken in Estate of E. P. Lamberth, 31 T.C. 302 (1958) also
grees with the Myer's case. In that case the Commissioner
ontended that an election to report income on the installment
asis was binding "in the absence of a material mistake of
fact * * *." (31 T.C. at 312.)



Richardson v. Commissioner of Internal Revenue, 126 F.2d 562 (2d Cir. 1942) stands for the proposition that n election made on the basis of a material mistake of law s likewise revocable. There the taxpayer honestly believed hat he had transferred certain stock in 1932 before the ffective date of the gift tax act passed in that year and, herefore, he did not claim the benefit in that year of the ifetime exemption allowed by the act. In 1934 the taxpayer eported gifts and claimed the full amount of his exemption. he Board of Tax Appeals held that the gifts in 1932 were not ompleted until after the adoption of the gift tax act and txed those transfers accordingly. It also held over the Commissioner's objections that the taxpayer was entitled to sift his exemption claimed in 1934 in order to claim his eemption in 1932. The Second Circuit in an opinion by Judge Fank agreed, declaring: "We see no reason why ignorance of te law is not equally a bar to an intelligent 'election,' ad why the taxpayer should be held to a choice made under a iapprehension of his legal liability." (126 F.2d at 569.) "[T]he power of a taxpayer to take advantage of a favorable rvision by amending his returns should not be confined to ntances where the taxpayer has made a mistake of fact. itakes of 'law,' at least if they are honest, are no less xusable." (126 F.2d at 570.)

In the instant case, taxpayer contends that the lction under Section 302(c) is not binding because of eral material mistakes of fact and law which have already



)een discussed. The taxpayer has a right to establish the ?acts relating to those mistakes at a trial of this action.

CONCLUSION

All taxpayer is requesting this Court to do is to send this case back to the District Court so that the issue as to the validity of taxpayer's election as it applies to the years 1951 and 1952 can be tried at the same time as the same issue is tried for the years 1953 through 1956 in the case now pending in the District Court. It would be a simple procedural matter for the two cases to be consolidated for trial since they involve the same issues and the same parties.

It is abundantly clear from the record that the only reason this case is before this Court is because of the tortuous administrative processes of government. If the Internal Revenue Service had not denied taxpayer's claims for refund for the years 1951 and 1952 and had simply held those claims in abeyance, as it did those for the later years, this case would not be here. If the claims for 1951 and 1952 had been held in abeyance, taxpayer could obtain a decision for all the years in the suit now pending in the District Court. Furthermore, if the Internal Revenue Service had abided by the settlement agreement entered into with taxpayer in July 1961, this case would not be here. Taxpayer was willing to abide by that agreement, but after more than a year of delay, the government finally repudiated it.

Taxpayer waited for over 7 years from the date that its first claim for refund in these cases was filed for the government to take final action upon its claims. In all of those years taxpayer has turned square corners with the government; it has patiently waited for the government to make up its mind and to test every avenue of approach for denying taxpayer's claims. Apparently taxpayer waited too long, for not only does the Internal Revenue Service claim that it has succeeded through judicial decisions and congressional legislation in defeating taxpayer's depletion claims, but the Service also maintains that it has succeeded in defeating taxpayer's net operating loss claims through a change in administrative decisions.

We do not believe that the Internal Revenue Service can thus defeat a taxpayer's claims through long administrative delays, changes in administrative decisions and repudiation of agreements. Taxpayer submits that it has the right to present the issues in this case to a court for trial and determination of whether this taxpayer, or any taxpayer, is ultimately bound by the course of administrative action presented in this case. Taxpayer respectfully asks this Court to allow it to have this opportunity for all of the years 1951 through 1956 involved in the claims for refund and not just for the years 1953 through 1956 now pending in the suit before the District Court.

Therefore, appellant taxpayer submits that this Court should reverse the District Court's summary judgment and

remand the case to the District Court for trial.

Dated: January 2, 1963.

Respectfully submitted,

CLARENCE E. MUSTO

Clarence E. Musto

FRANKLIN C. LATCHAM

Franklin C. Latcham

WILLIAM R. BERKMAN

William R. Berkman

MORRISON, FOERSTER, HOLLOWAY, CLINTON & CLARK

Morrison, Foerster, Holloway, Clinton & Clark

Attorneys for Appellant
Santa Cruz Portland Cement Company

APPENDIX A

Complaint filed in Santa Cruz Portland Cement Co. v. United States of America, without attached exhibits, in the United States District Court for the Northern District of California, Southern Division.

APPENDIX A

[Endorsed]: Original filed Oct 22 1962 Clerk, U. S. Dist. Court San Francisco

Clarence E. Musto, Esq.
Franklin C. Latcham, Esq.
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1100 Crocker Building
San Francisco 4, California
Telephone GArfield 1-5670
Attorneys for Plaintiff

In the United States District Court for the Northern District of California, Southern Division

No. 41063

Santa Cruz Portland Cement Company, a corporation,
Plaintiff,
vs.
The United States of America,
Defendant.

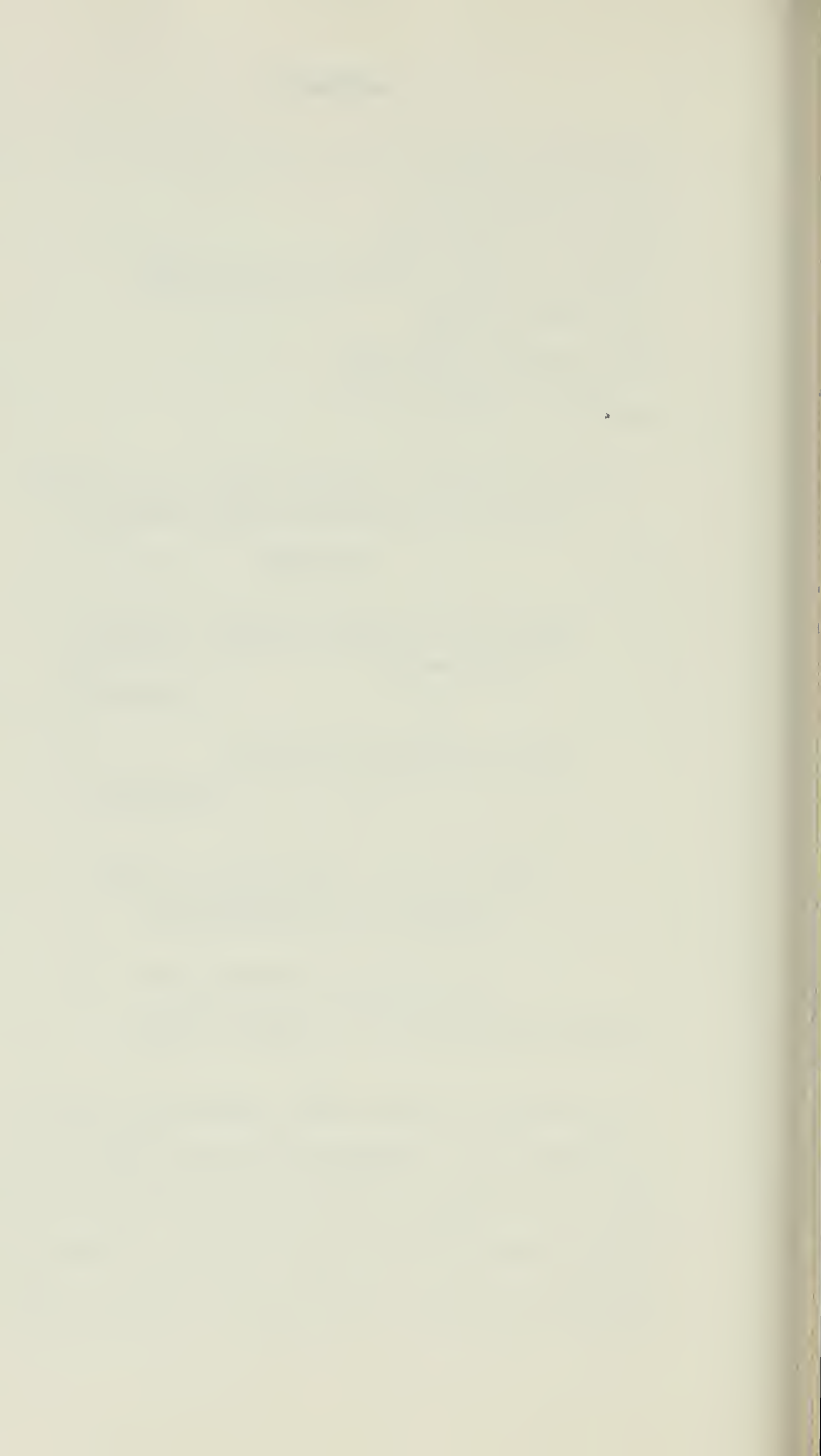
COMPLAINT TO RECOVER TAXES ILLEGALLY COLLECTED

FIRST CLAIM FOR RELIEF

Plaintiff alleges for its first claim for relief:

I

At all times mentioned herein plaintiff has been and is a corporation duly organized and existing under and by virtue of the laws of the State of California with its principal place of business in the City and County of San Francisco, State of California. On February 6, 1956, plaintiff elected to wind up its affairs and voluntarily dissolve. Plaintiff is presently in the process of voluntary dissolu-



tion, which process is being conducted under judicial supervision of the Superior Court of the State of California in and for the City and County of San Francisco in accordance with the provisions of Sections 4607 through 4619 of the Corporations Code of the State of California.

II

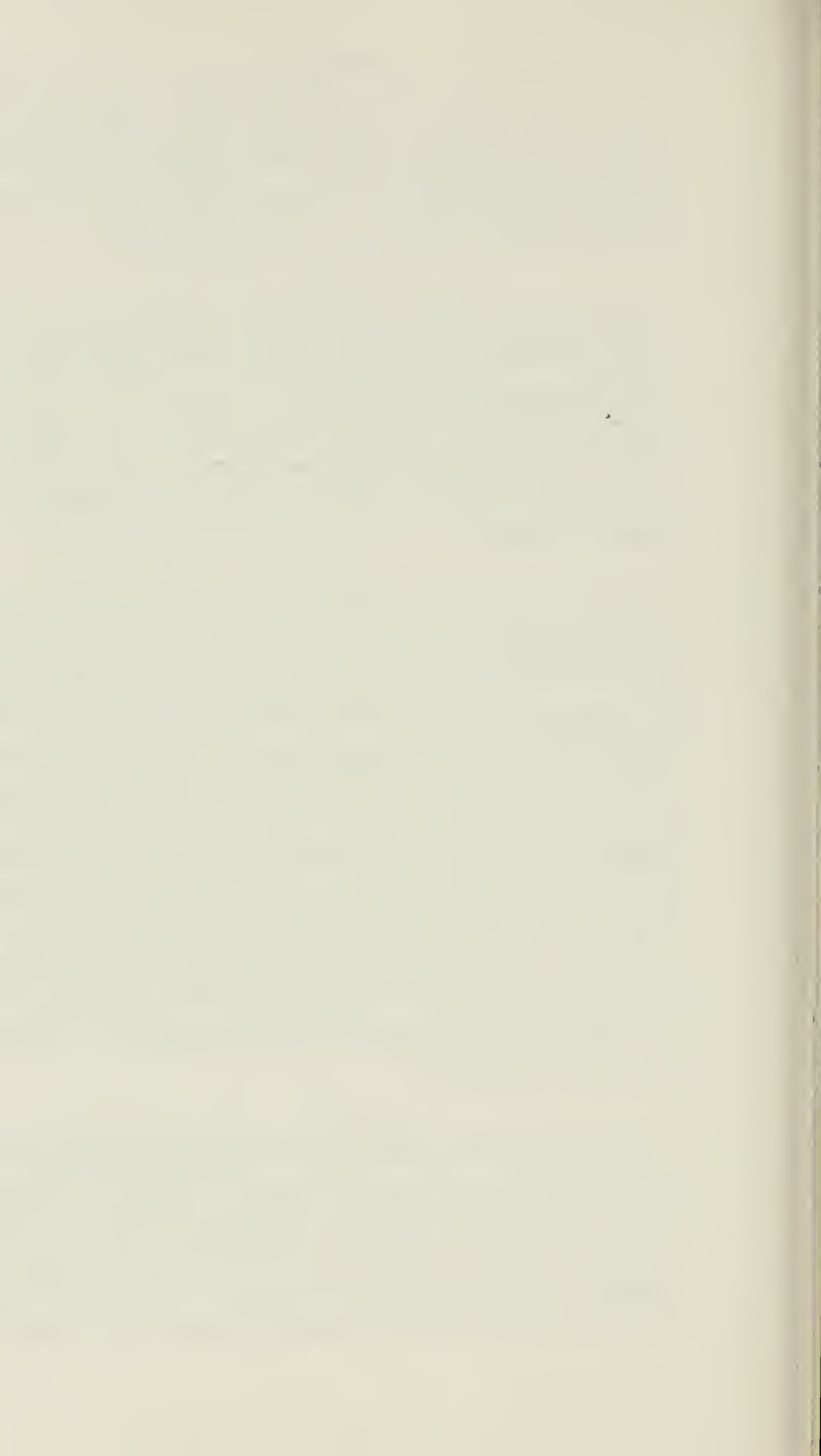
Plaintiff brings this action against defendant pursuant to the provisions of Title 28, United States Code, Section 1346 (as amended July 30, 1954 by Public Law 559, 68 Statutes 589) and Title 26, United States Code, Section 7422 (section 7422 of the Internal Revenue Code of 1954). This action is for the recovery of corporation income taxes illegally collected.

III

On July 15, 1954 plaintiff filed with the District Director of Internal Revenue of the United States for the First District of California its corporation income tax return for the calendar year 1953 upon Treasury Department Form 1120 furnished by the Commissioner of Internal Revenue of the United States for that purpose. Said return was timely filed pursuant to an extension of time duly granted. Said return showed a corporation income tax due for said year from plaintiff in the amount of $619,294.24. The amount shown due on said return was paid to the District Director of Internal Revenue for said First District as follows: February 25, 1954—$278,200; June 15, 1954—$278,200; July 15, 1954—$964.82; September 14, 1954—$30,964.71; December 1, 1954—$30,964.71.

IV

During the entire calendar years 1953, 1954 and 1955, and for the period commencing January 1, 1956, and ending March 13, 1956, the business of plaintiff consisted of the production and sale of cement. The raw materials used by plaintiff in the production of cement were mined from plaintiff quarry located at Davenport, Santa Cruz County,



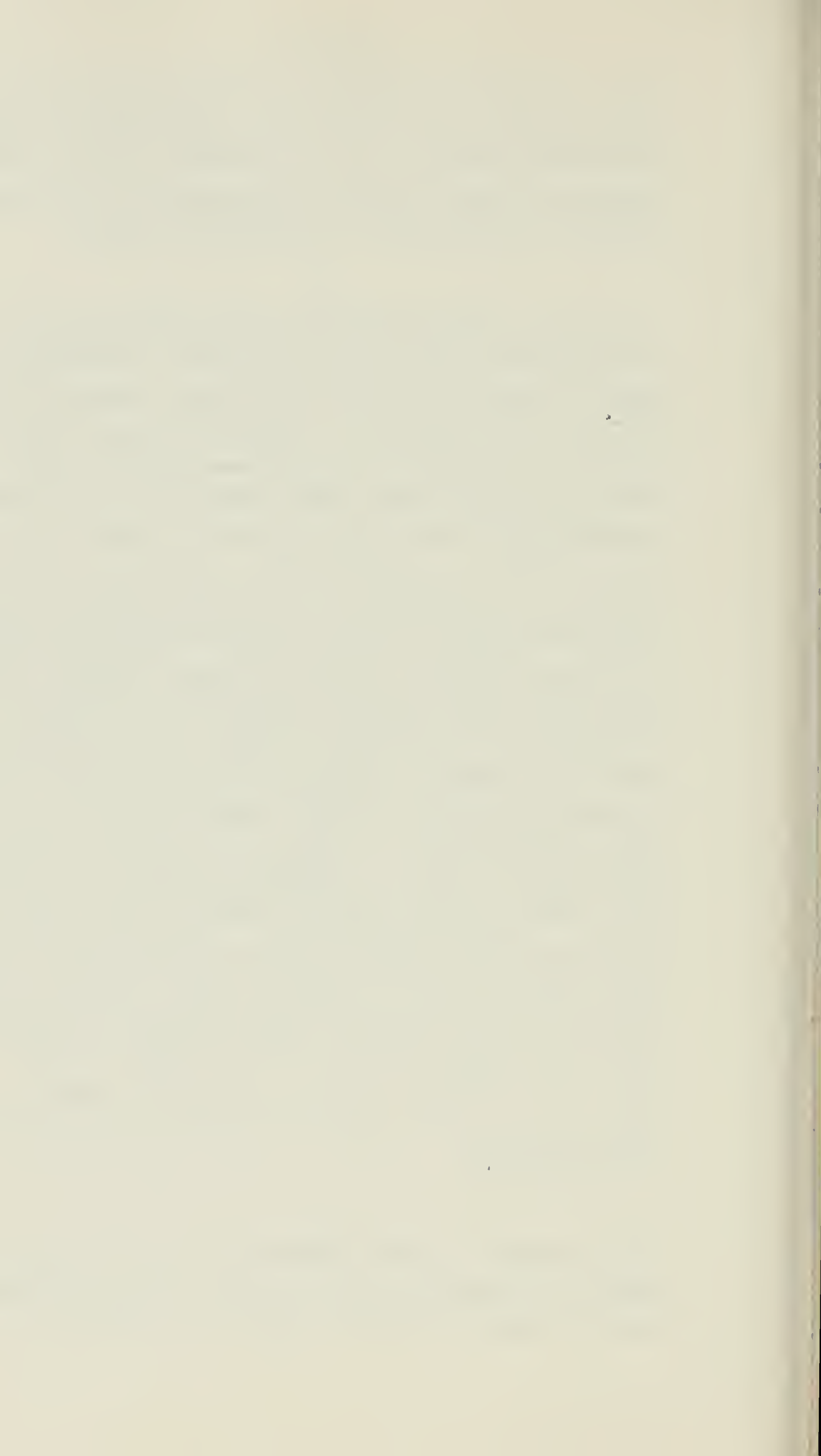
State of California. On March 13, 1956, plaintiff sold its cement business and related assets; commencing with said date plaintiff ceased to carry on business and has since engaged in no other corporate activities except to the extent necessary for the beneficial winding up of its affairs.

V

On July 11, 1957 plaintiff filed with the District Director of Internal Revenue for the First District of California a claim for refund of income taxes illegally collected from plaintiff for the calendar year 1953 upon Treasury Department Form 843 furnished by said Commissioner of Internal Revenue for that purpose. Said claim was in the amount of $162,195.24 or such greater amount as is legally refundable. Said claim was timely filed in accordance with the provisions of section 6511(a) of the Internal Revenue Code of 1954. Said claim was based upon the following grounds: (i) taxpayer's failure to claim percentage depletion in the amount allowable pursuant to the provisions of section 114 of the Internal Revenue Code of 1939; (ii) any inclusion by plaintiff of a greater percentage of dividends received than is properly includable in taxable income for the year; and (iii) plaintiff's failure to claim or the Treasury Department's failure to allow, as deductions, ordinary and necessary business expenses incurred during the year, interest and taxes accrued during the year, and depreciation and losses properly allowable during the year. A copy of said claim for refund of taxes illegally collected is attached hereto and marked "Exhibit A" and is hereby referred to and by such reference is made a part of this complaint as fully and to the same extent as if it were set out at large in this paragraph.

VI

On November 14, 1960 plaintiff filed with the District Director of Internal Revenue for the First District of California a statement of election under section 302(c)(2) of



the Public Debt and Tax Rate Extension Act of 1960. Said statement of election related to the calendar years 1951 through 1956. A copy of said statement of election is attached hereto and marked "Exhibit B" and is hereby referred to and by such reference is made a part of this complaint as fully and to the same extent as if it were set out at large in this paragraph. The assertion of deficiencies in plaintiff's income taxes for said years 1951 through 1956 were barred by applicable provisions of the Internal Revenue Code. Said statement of election was filed by plaintiff as a result of several material mistakes of fact and law. In causing plaintiff to file said statement of election, plaintiff relied upon the following erroneous propositions of fact and law: (i) that plaintiff's legally allowable depletion for the calendar years 1951 through 1956 did not exceed the amount claimed in its corporation income tax returns filed for said years; (ii) that certain claims for refund by plaintiff relating to net operating losses incurred in the calendar years 1957, 1958 and 1959 were recognized by the Internal Revenue Service as proper net operating loss carrybacks to the years 1955 and 1956; and (iii) that the filing of said statement of election was necessary in order to prevent the Internal Revenue Service from claiming that the depletion deductions taken by plaintiff on its returns filed for the years 1951 through 1956 were excessive and should be offset against plaintiff's claims for refunds relating to the net operating losses incurred in the years 1957, 1958 and 1959. Plaintiff was induced into relying upon some or all of the foregoing erroneous propositions of fact and law upon representations made to plaintiff by the Internal Revenue Service. Said election was and is void and of no force and effect and is not binding upon plaintiff; in the alternative, defendant is estopped from asserting in this action that said election has any force and effect and is binding upon plaintiff.

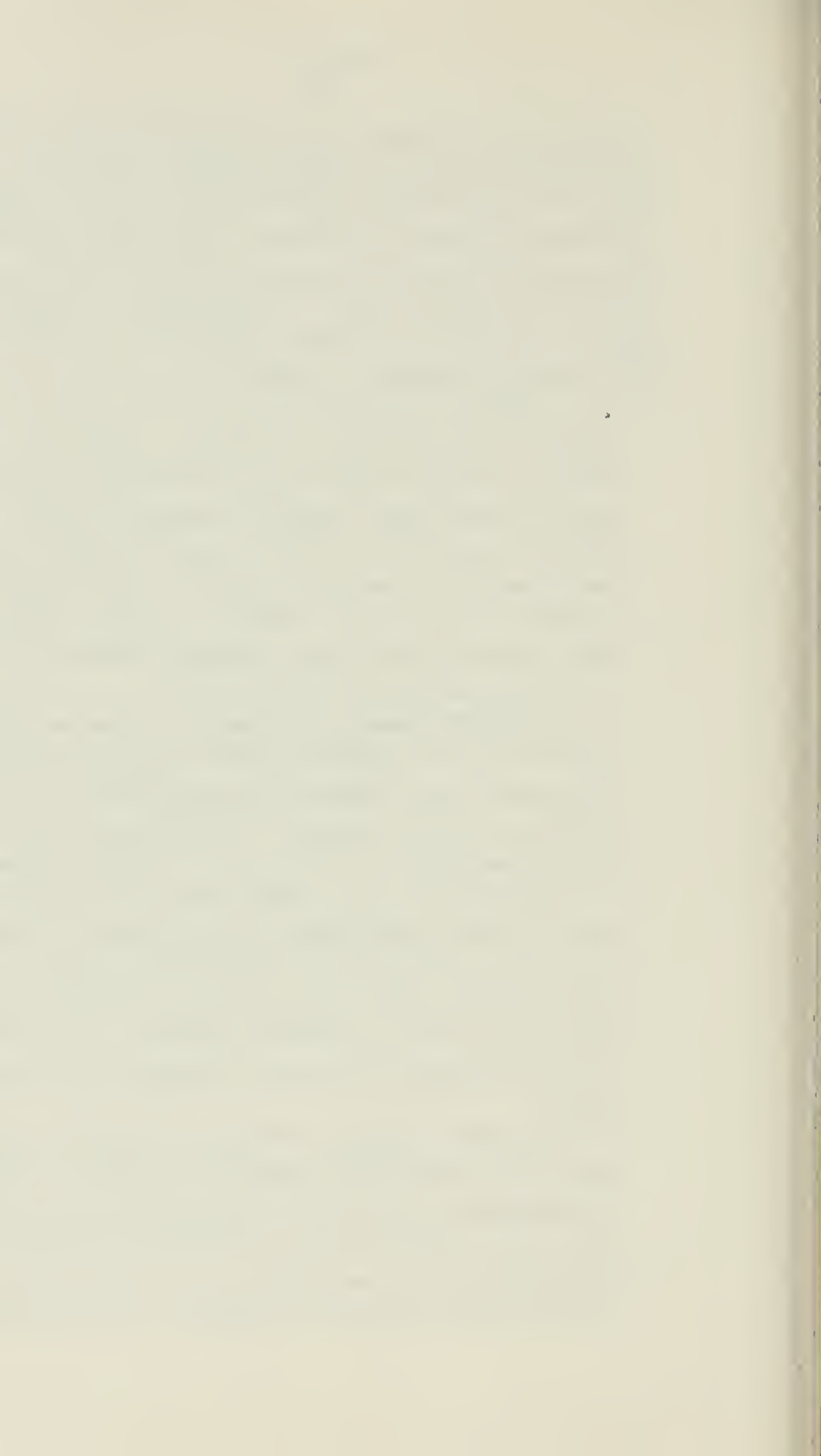
VII

Subsequent to the filing of said statement of election the Internal Revenue Service audited plaintiff's claims for refund for the years 1953 through 1956, and on July 6, 1961, a settlement agreement was entered into between plaintiff and the District Director of Internal Revenue for the First District of California which is summarized in subparagraphs (a) through (d) of this paragraph and embodied in the documents referred to therein:

(a) Plaintiff acceded to said District Director's disallowance of its claims for refund for said years relating to cement depletion and certain other issues, and pursuant thereto plaintiff through its Board of Directors signed Form 2297, a copy of which is attached hereto and marked "Exhibit C" and is hereby referred to and by such reference is made a part of this complaint as fully and to the same extent as if it were set out at large in this paragraph.

(b) Plaintiff through its Board of Directors also executed two forms entitled ROSF Form 402, one for the taxable years 1953 and 1954 and the other for the taxable year 1956, pursuant to which plaintiff agreed to the disallowance of the claims for refund relating to cement depletion and certain other issues for those years. Copies of said agreements are attached hereto and marked "Exhibit D" and "Exhibit E", respectively, and are hereby referred to and by such reference are made a part of this complaint as fully and to the same extent as if they were set out at large in this paragraph.

(c) Plaintiff through its Board of Directors also signed Form 870 which signified its acceptance of an overassessment for the year 1955 relating to net operating losses incurred in the years 1957 and 1958 and carried back to the year 1955. A copy of said form is attached hereto and marked "Exhibit F" and is hereby



referred to and by such reference is made a part of this complaint as fully and to the same extent as if it were set out at large in this paragraph.

(d) As a part of said settlement agreement said District Director also agreed to allow the refund resulting from the net operating loss occurring in 1959 and carried back to 1956.

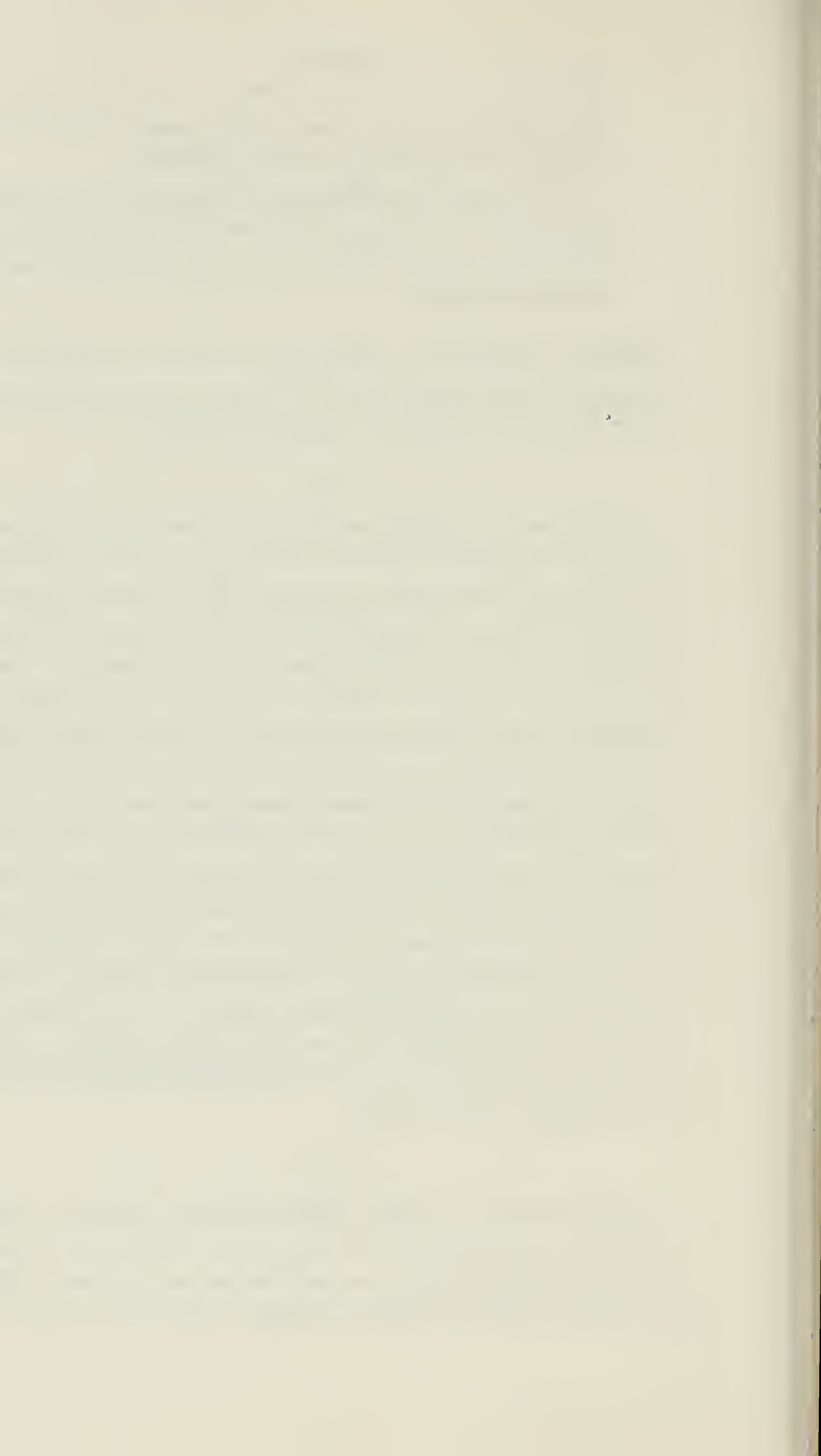
Although plaintiff has carried out in full its obligations contained in said agreement, said District Director has not carried out his obligations contained therein.

VIII

On November 3, 1961 the District Director of Internal Revenue for the First District of California, mailed to plaintiff a report constituting a review of the settlement agreement set forth in Paragraph VII of this claim for relief. A copy of said report is attached hereto and marked "Exhibit G" and is hereby referred to and by such reference is made a part of this complaint as fully and to the same extent as if it were set out at large in this paragraph. The report accepted said agreement except that the report proposed a disallowance of the net operating loss carrybacks from the years 1958 and 1959 to the years 1955 and 1956, respectively, which the plaintiff and District Director had previously agreed would be allowed. The report proposed that if the plaintiff accepted the findings it should execute an enclosed agreement form and return it to the District Director, or if plaintiff did not accept the proposed findings, it should file a protest to the findings within 30 days from the date of the report.

IX

On November 21, 1961, plaintiff filed a protest to the foregoing report insofar as said report proposed to disallow the net operating loss carrybacks for the years 1958 and 1959 to the years 1955 and 1956, respectively, contrary



to the previous settlement agreement set forth in Paragraph VII of this claim for relief.

X

Plaintiff, on July 6, 1961, executed said Form 2297 which is referred to in Paragraph VII of this claim for relief and a copy of which is attached hereto and marked "Exhibit C", which form constitutes a waiver of the requirement under section 6532(a)(1) of the Internal Revenue Code that a notice be sent by certified mail or registered mail of disallowance in whole or in part, in the amounts set forth in said Form 2297, of plaintiff's claims for refund for the calendar years 1953, 1954, 1955 and 1956.

XI

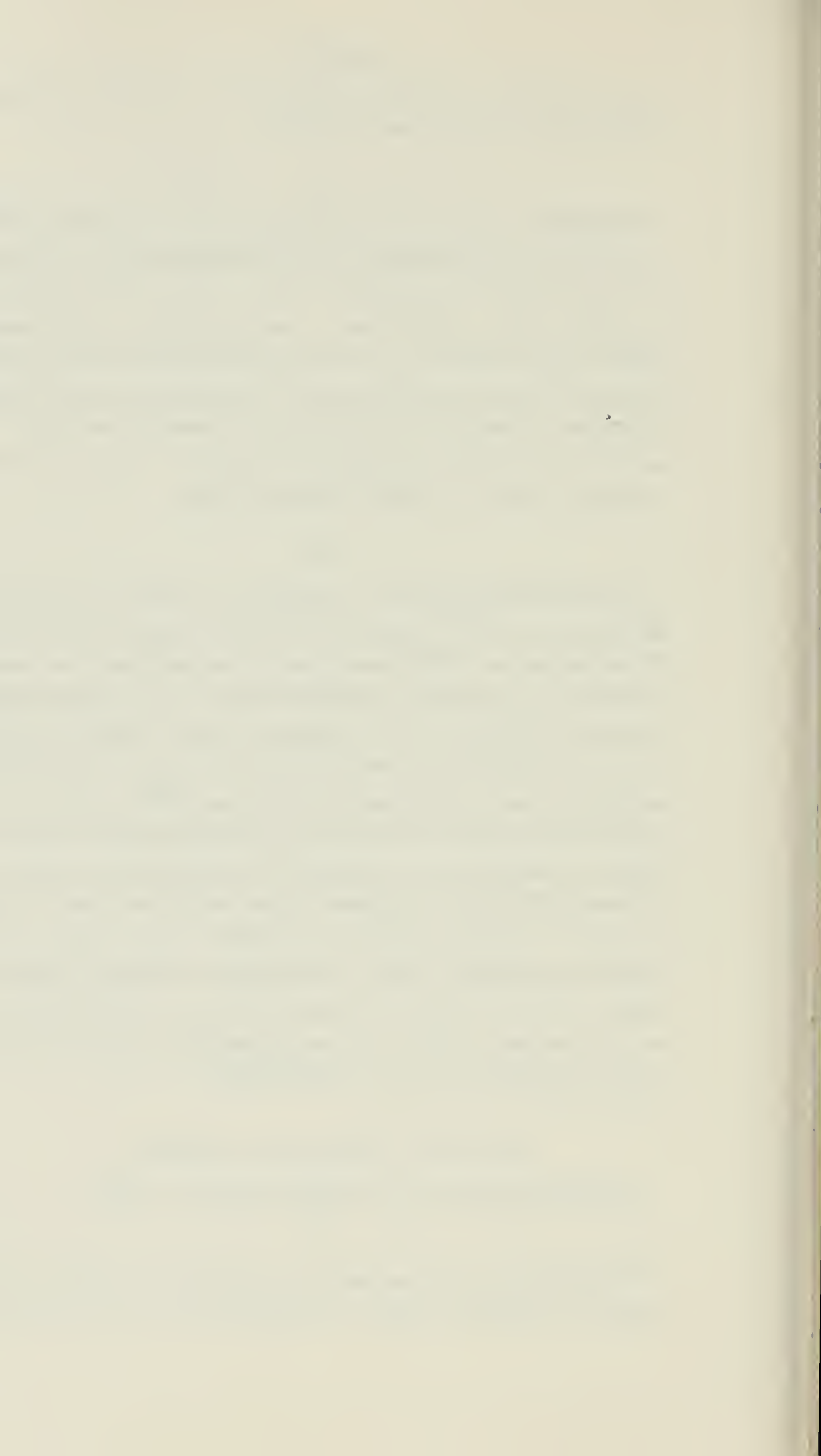
Plaintiff alleges that it overpaid its income tax for the calendar year 1953 because: (i) its net taxable income for the calendar year 1953 upon which it has paid tax was inadvertently overstated on its income tax return for said year in that the deduction for depletion therein claimed in the amount of $239,026.17 was less than the properly allowable amount of said deduction for the year 1953; and (ii) its correct net taxable income for the year 1953 should be determined by allowing as a deduction for depletion the sum of at least $550,940.09 computed upon the correct basis that the entire amount realized by plaintiff from sales of its cement constituted gross income from mining. Plaintiff alleges further that said Commissioner of Internal Revenue erroneously failed to allow plaintiff's refund claim for the year 1953 in the sum of $162,195.24.

SECOND CLAIM FOR RELIEF

Plaintiff alleges for its second claim for relief:

I

Plaintiff expressly realleges in this claim for relief each and every allegation made in Paragraphs I, II, IV, VI, VII,



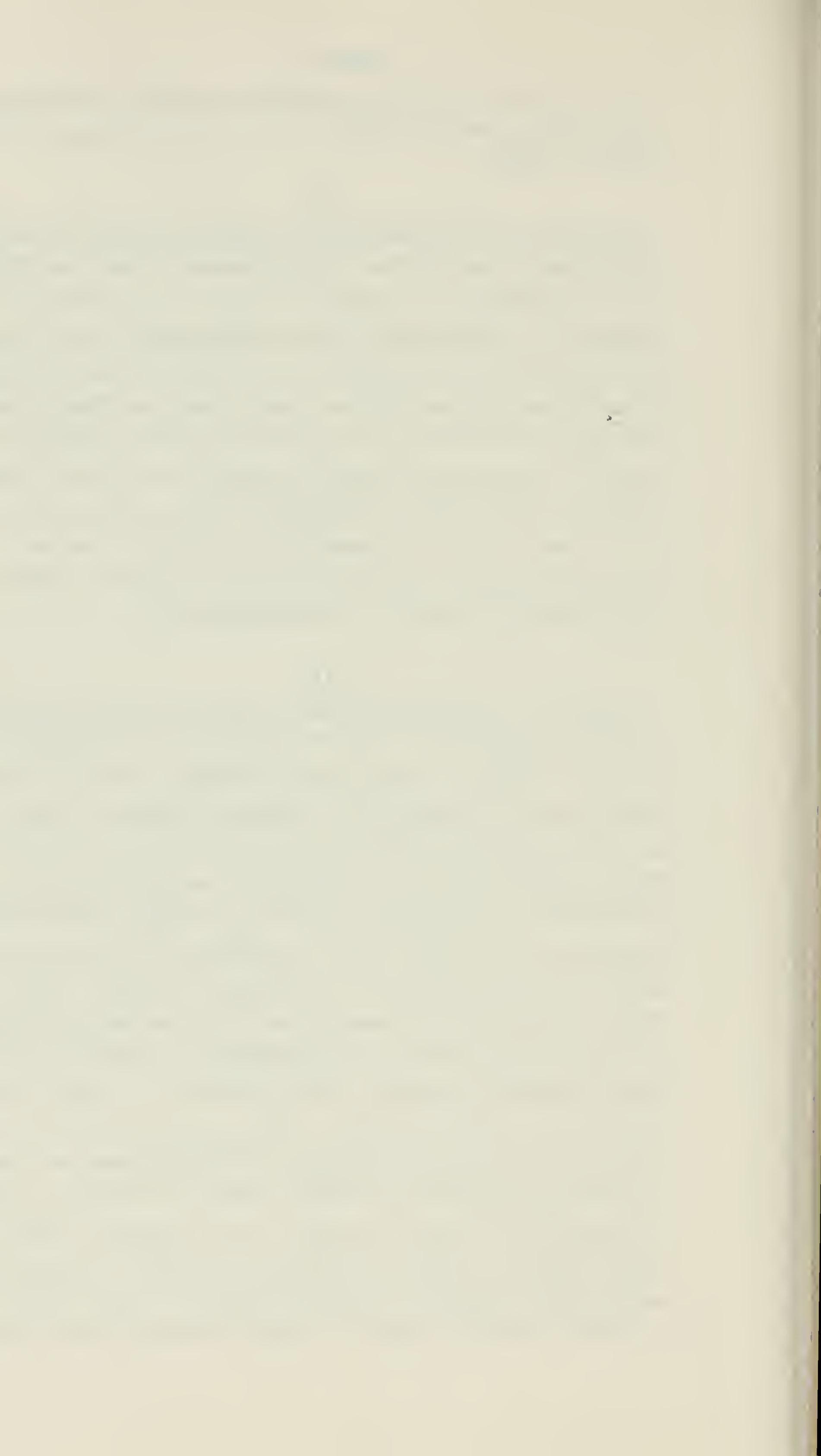
VIII, IX, and X of the First Claim for Relief as fully and to the same extent as if they were set out at large in this claim for relief.

II

On June 14, 1955 plaintiff filed with the District Director of Internal Revenue of the United States for the First District of California its corporation income tax return for the calendar year 1954 upon Treasury Department Form 1120 furnished by the Commissioner of Internal Revenue of the United States for that purpose. Said return was timely filed pursuant to an extension of time duly granted. Said return showed a corporation income tax due for said year from plaintiff in the amount of $455,942.34. The amount shown due on said return was paid to the District Director of Internal Revenue for said First District as follows: March 4, 1955—$228,500; June 14, 1955—$227,442.34.

III

On March 4, 1958 plaintiff filed with the District Director of Internal Revenue for the First District of California a claim for refund of income taxes illegally collected from plaintiff for the calendar year 1954 upon Treasury Department Form 843 furnished by said Commissioner of Internal Revenue for that purpose. Said claim was in the amount of $115,446.59 or such greater amount as is legally refundable. Said claim was timely filed in accordance with the provisions of section 6511(a) of the Internal Revenue Code of 1954. Said claim was based upon the following grounds: (i) the previous incorrect determination of percentage depletion allowable pursuant to the provisions of section 613 of the Internal Revenue Code of 1954; (ii) any inclusion by plaintiff of a greater percentage of dividends received than is properly includable in taxable income for the year, and (iii) plaintiff's failure to claim, or the Treasury Department's failure to allow as deductions, ordinary and necessary business expenses incurred during the year, interest and taxes accrued during the year, and depreciation and



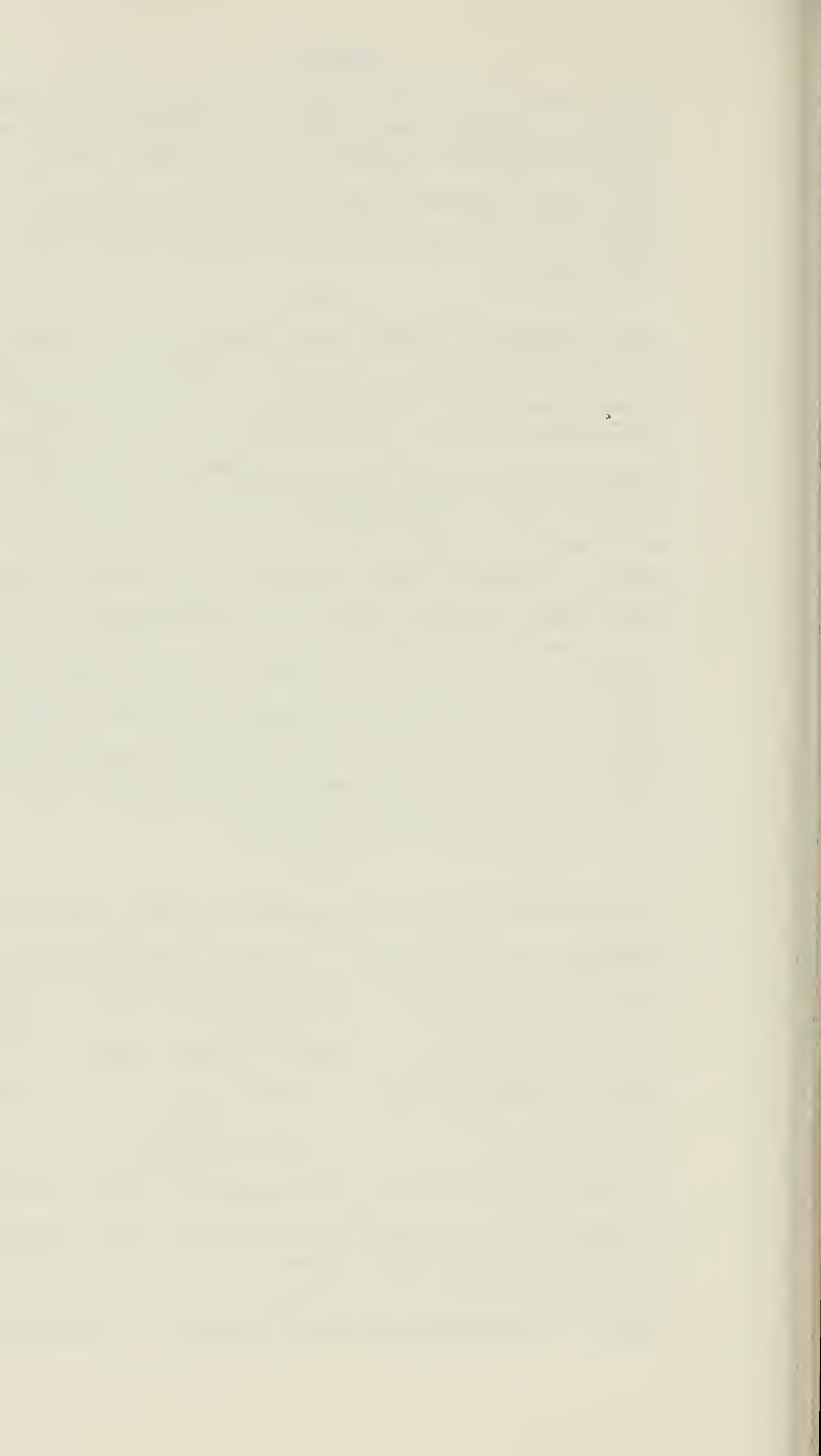
losses properly allowable during the year. A copy of said claim for refund of taxes illegally collected is attached hereto and marked "Exhibit H" and is hereby referred to and by such reference is made a part of this complaint as fully and to the same extent as if it were set out at large in this paragraph.

IV

On February 24, 1961 plaintiff filed with the District Director of Internal Revenue for the First District of California, upon Treasury Department Form 843 furnished by said Commissioner of Internal Revenue for that purpose, an amendment to said claim for refund filed by plaintiff on March 4, 1958. Said amendment made an additional claim in the amount of $30,451.68 or such greater amount as is legally refundable. Said amendment was based upon the ground that during the calendar year 1956 plaintiff incurred a net operating loss which constituted a net operating loss deduction for the calendar year 1954. A copy of said amendment is attached hereto and marked "Exhibit I" and is hereby referred to and by such reference is made a part of this complaint as fully and to the same extent as if it were set out at large in this paragraph.

V

Plaintiff alleges that it overpaid its income tax for the calendar year 1954 because: (i) its net taxable income for the calendar year 1954 upon which it has paid tax was inadvertently overstated on its income tax return for said year in that the deduction for depletion therein claimed in the amount of $356,189.69 was less than the properly allowable amount of said deduction for the year 1954; (ii) its correct net taxable income for the year 1954 should be determined by allowing as a deduction for depletion the sum of at least $578,202.36 computed upon the correct basis that the entire amount realized by plaintiff from sales of its cement constituted gross income from mining, and (iii) the net operating loss of $58,560.93 incurred by plaintiff in the calendar



year 1956 should be allowed as a net operating loss deduction for the calendar year 1954. Plaintiff alleges further that said Commissioner of Internal Revenue erroneously failed to allow plaintiff's said refund claim for the year 1954 in the sum of $115,446.59 and erroneously failed to allow plaintiff's amendment to said refund claim which amendment is in the sum of $30,451.68.

THIRD CLAIM FOR RELIEF

Plaintiff alleges for its third claim for relief:

I

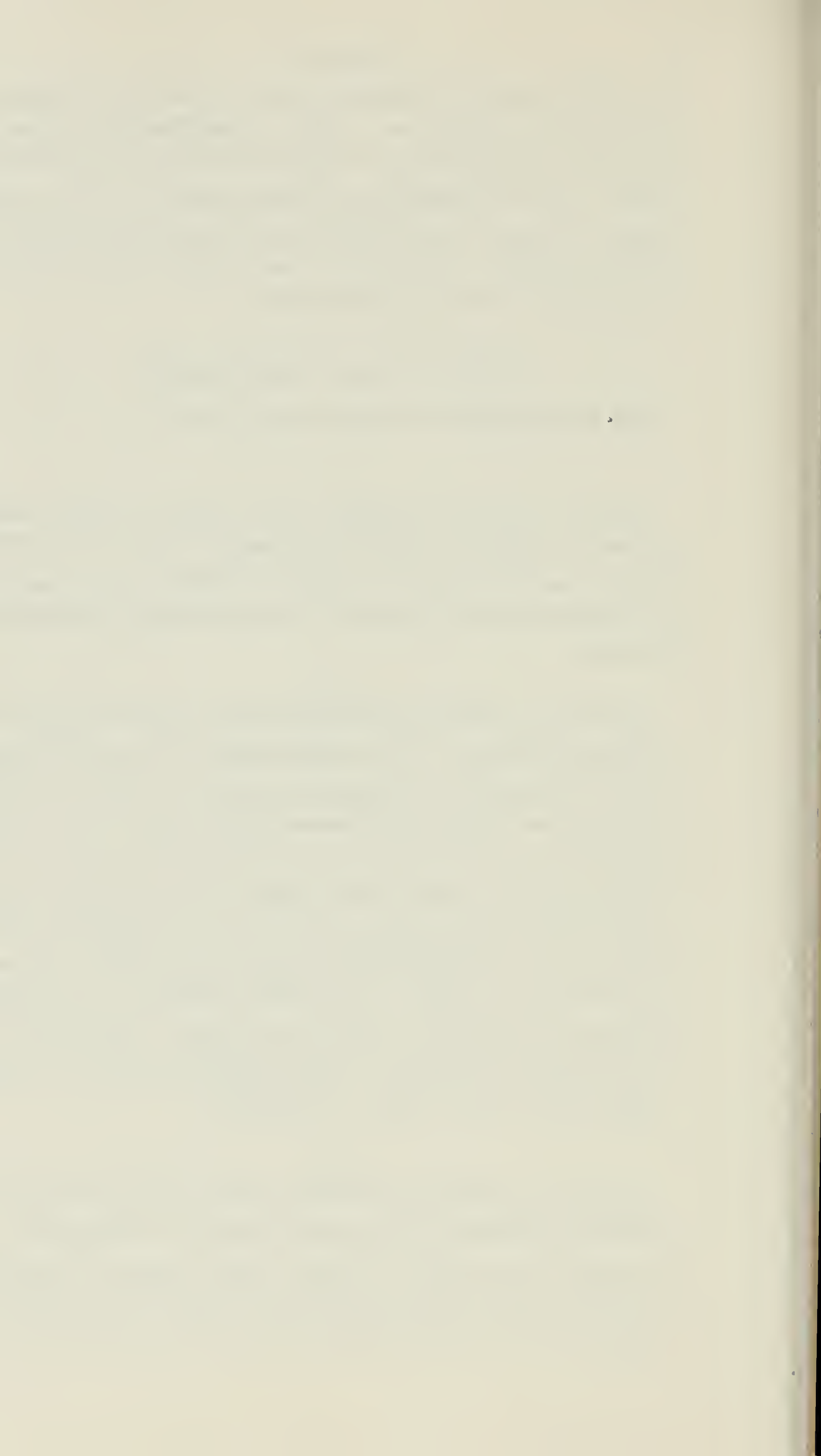
Plaintiff expressly realleges in this claim for relief each and every allegation made in paragraphs I, II, IV, VI, VII, VIII, IX and X of the First Claim for Relief as fully and to the same extent as if they were set out at large in this claim for relief.

II

On March 12, 1956 plaintiff filed with the District Director of Internal Revenue of the United States for the First District of California its corporation income tax return for the calendar year 1955 upon Treasury Department Form 1120 furnished by the Commissioner of Internal Revenue of the United States for that purpose. Said return showed a corporation income tax due for said year from plaintiff in the total amount of $1,320,856.93. The amount shown due on said return was paid to the District Director of Internal Revenue for said First District as follows: September 7, 1955—$20,000; December 13, 1955—$20,000; March 12, 1956—$640,428.47; June 11, 1956—$640,428.46.

III

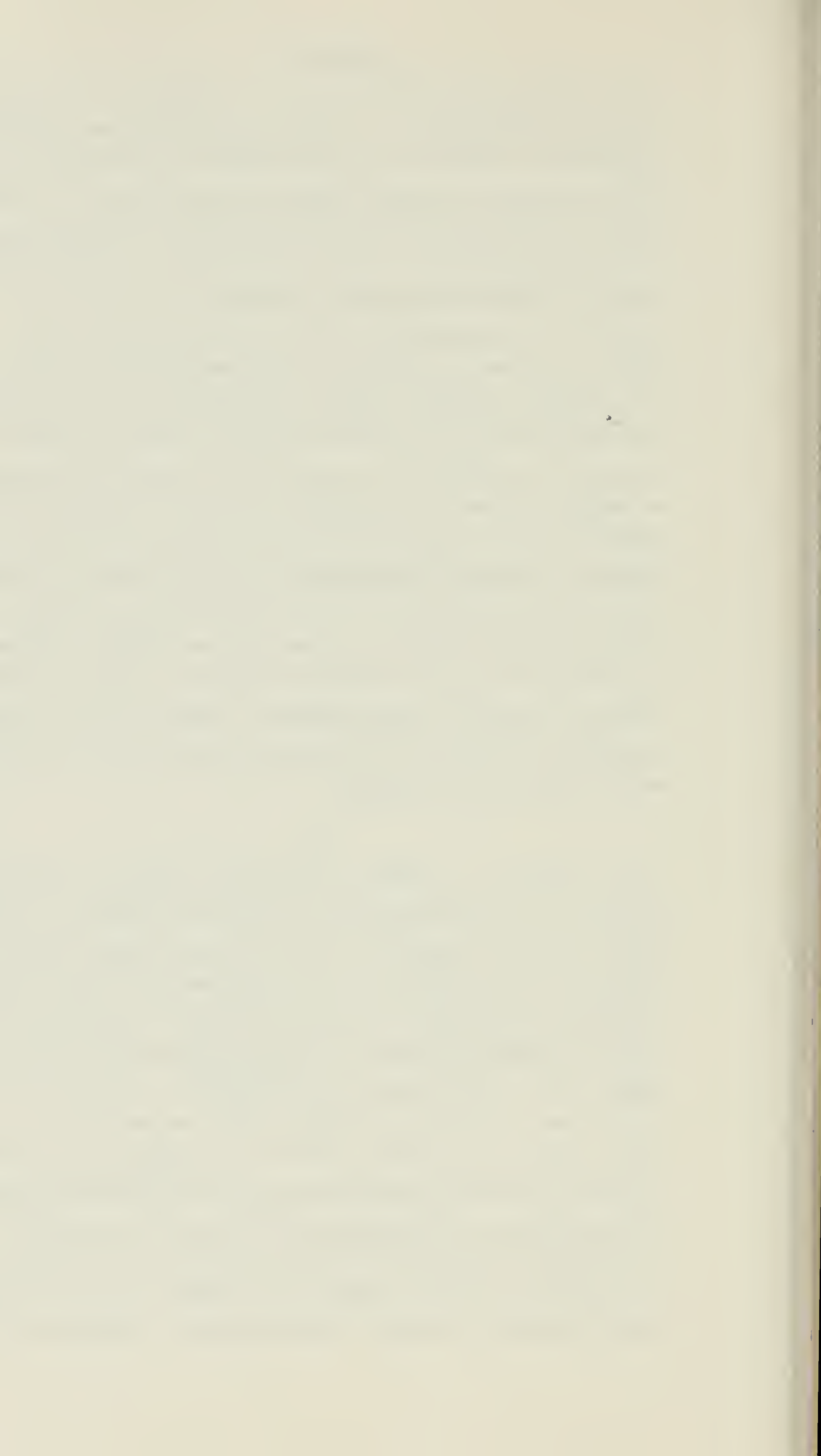
On March 13, 1959 plaintiff filed with the District Director of Internal Revenue for the First District of California a first claim for refund of income taxes illegally collected from plaintiff for the calendar year 1955 upon Treasury Department Form 843 furnished by said Commissioner of



Internal Revenue for that purpose. Said claim was in the amount of $527,276.98 or such greater amount as is legally refundable. Said claim was timely filed in accordance with the provisions of sections 6511(a) and 6511(d)(2) of the Internal Revenue Code of 1954. Said claim was based upon the following grounds: (i) the previous incorrect determination of percentage depletion allowable pursuant to the provisions of section 613 of the Internal Revenue Code of 1954; (ii) the net operating loss incurred by plaintiff during the calendar year 1957 which constituted a net operating loss deduction for the calendar year 1955; (iii) any inclusion in income by plaintiff of an amount not properly includable in taxable income for the year; and (iv) any failure by plaintiff to accrue and deduct taxes, ordinary and necessary business expenses, depreciation, or losses on sales of property which constituted allowable deductions for the year. A copy of said first claim for refund of taxes illegally collected is attached hereto and marked "Exhibit J" and is hereby referred to and by such reference is made a part of this complaint as fully and to the same extent as if it were set out at large in this paragraph.

IV

On January 19, 1960 plaintiff filed with the District Director of Internal Revenue for the First District of California a second claim for refund of income taxes illegally collected from plaintiff for the calendar year 1955 upon Treasury Department Form 843 furnished by said Commissioner of Internal Revenue for that purpose. Said second claim was in the amount of $24,550.40 or such greater amount as is legally refundable. Said second claim was timely filed in accordance with the provisions of section 6511(d)(2) of the Internal Revenue Code of 1954. Said claim was based upon a net operating loss incurred by plaintiff in the calendar year 1958 which constituted a net operating loss deduction for the calendar year 1955. A copy of said second claim for refund of taxes illegally collected is at-



tached hereto and marked "Exhibit K" and is hereby referred to and by such reference is made a part of this complaint as fully and to the same extent as if it were set out at large in this paragraph.

V

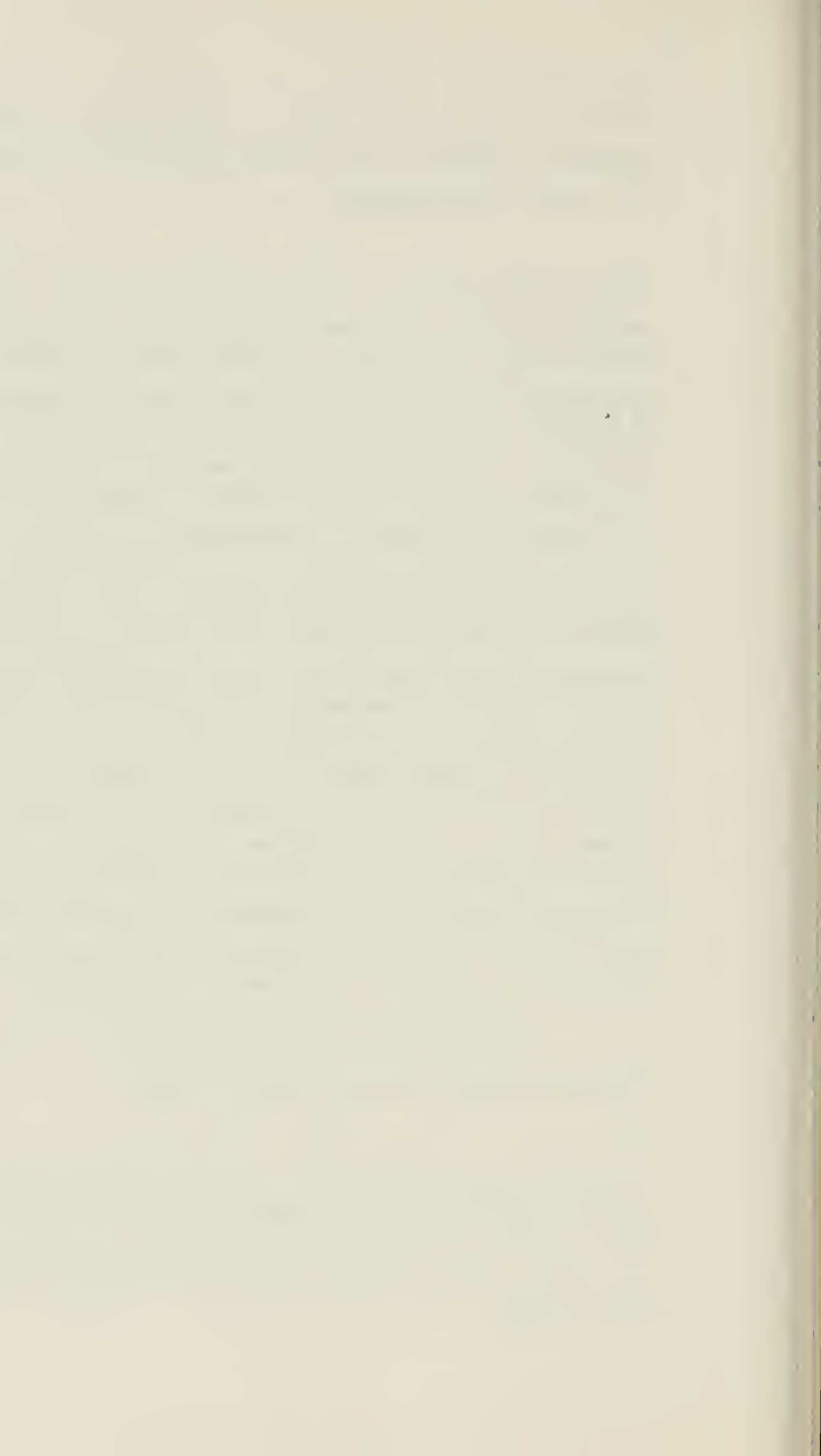
Plaintiff alleges that it overpaid its income tax for the year 1955 because: (i) its net taxable income for the year 1955 upon which it has paid tax was inadvertently overstated on its income tax return for said year in that the deduction for depletion therein claimed in the amount of $361,448.16 was less than the properly allowable amount of said deduction for the year 1955; (ii) its correct net taxable income for the year 1955 should be determined by allowing as a deduction for depletion the sum of at least $1,145,312.75 computed upon the correct basis that the entire amount realized by plaintiff from sales of its cement constituted gross income from mining; (iii) it was not completely liquidated and dissolved by December 31, 1957 and has not been completely liquidated and dissolved since that date; and (iv) its correct net taxable income for the year 1955 should be determined by allowing as a net operating loss deduction, predicated upon net operating loss carrybacks from the years 1957 and 1958, the sum of at least $277,341.91. Plaintiff alleges further that said Commissioner of Internal Revenue erroneously failed to allow plaintiff's said first and said second refund claims in the total amount of $551,827.38.

FOURTH CLAIM FOR RELIEF

Plaintiff alleges for its fourth claim for relief:

I

Plaintiff expressly realleges in this claim for relief each and every allegation made in paragraphs I, II, IV, VI, VII, VIII, IX and X of the First Claim for Relief as fully and to the same extent as if they were set out at large in this claim for relief.



II

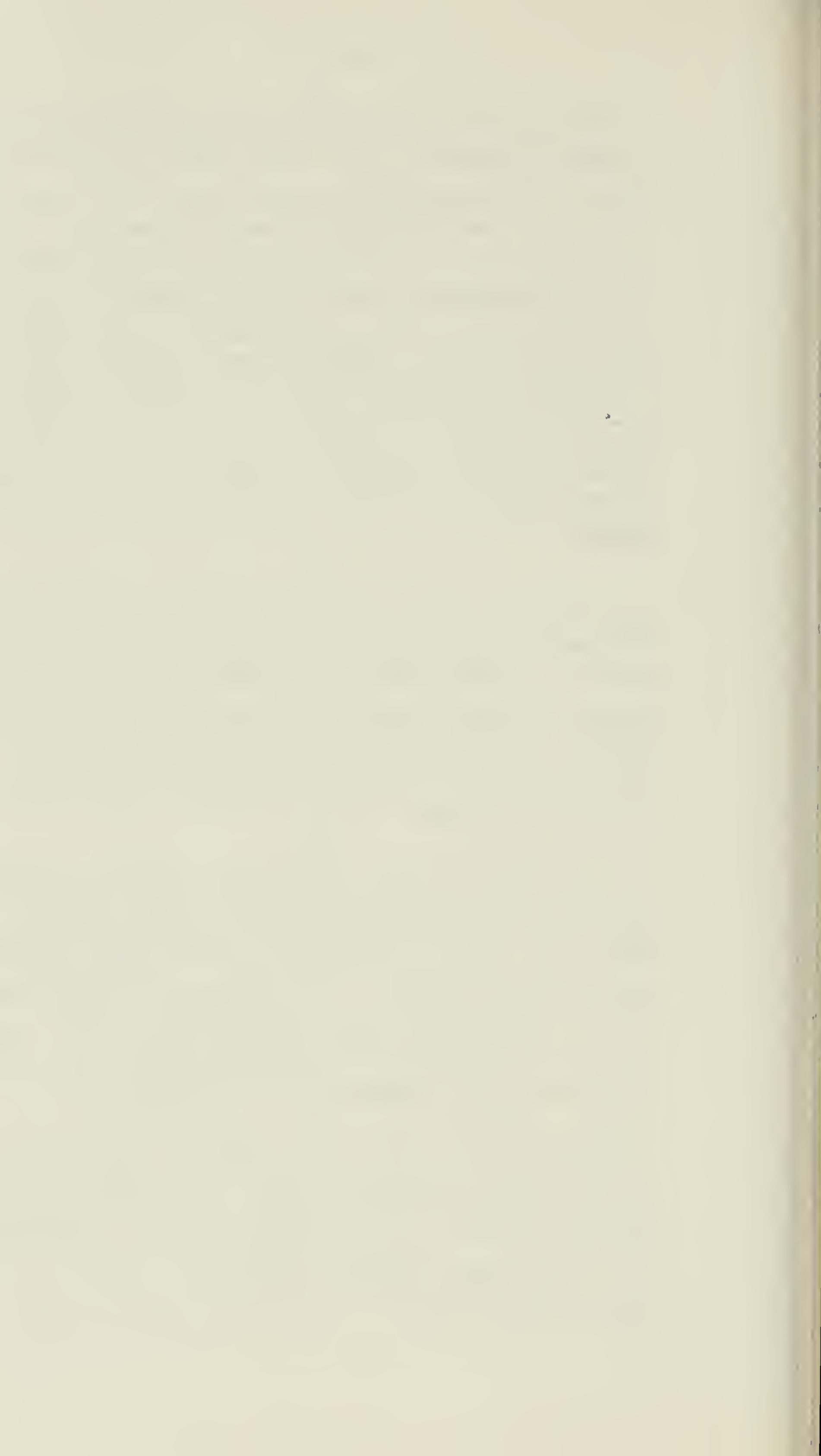
On March 13, 1957 plaintiff filed with the District Director of Internal Revenue of the United States for the First District of California its corporation income tax return for the calendar year 1956 upon Treasury Department Form 1120 furnished by the Commissioner of Internal Revenue of the United States for that purpose. Said return showed a corporation income tax due for said year from plaintiff in the total amount of $59,906.96. The amount shown due on said return was paid to the District Director of Internal Revenue for said First District as follows: On or before September 15, 1956—$3,000; on or before December 15, 1956—$3,000; March 13, 1957—$26,953.48; June 3, 1957—$26,953.48.

III

In a Revenue Agent's report dated August 20, 1957 plaintiff's income tax liability for the year 1956 was redetermined to be $66,575.60. The resulting deficiency in the amount of $6,668.64 together with interest thereon in the amount of $528.64 was paid to the District Director of Internal Revenue for the First District of California on or about July 1, 1958.

IV

On January 19. 1960 plaintiff filed with the District Director of Internal Revenue for the First District of California a claim for refund of income taxes illegally collected from plaintiff for the calendar year 1956 upon Treasury Department Form 843 furnished by said Commissioner of Internal Revenue for that purpose. Said claim was in the amount of $63,370.15 or such greater amount as is legally refundable. Said claim was timely filed in accordance with the provisions of section 6511(a) of the Internal Revenue Code of 1954. Said claim was based upon the following grounds: (i) the previous incorrect determination of percentage depletion allowable pursuant to the provisions of section 613 of the Internal Revenue Code of 1954; (ii) any inclusion in income by plaintiff of an amount



not properly includable in taxable income for the year; and (iii) any failure by plaintiff to accrue and deduct taxes, ordinary and necessary business expenses, depreciation, or losses on sales of property which constituted allowable deductions for the year. A copy of said claim for refund of taxes illegally collected is attached hereto and marked "Exhibit L" and is hereby referred to and by such reference is made a part of this complaint as fully and to the same extent as if it were set out at large in this paragraph.

V

On February 24, 1961 plaintiff filed with the District Director of Internal Revenue for the First District of California upon Treasury Department Form 843 furnished by said Commissioner of Internal Revenue for that purpose, an amendment to said claim for refund filed by plaintiff on January 19, 1960. Said amendment was in the amount of $66,575.60. Said amendment was based upon the ground that plaintiff had failed to claim the entire unamortized past service costs of its pension plan for salaried employees in computing its net income for the calendar year 1956. A copy of said amendment is attached hereto and marked "Exhibit M" and is hereby referred to and by such reference is made a part of this complaint as fully and to the same extent as if it were set out at large in this paragraph.

VI

Plaintiff alleges that it overpaid its income tax for the calendar year 1956 because: (i) its net taxable income for the calendar year 1956 upon which it has paid tax was inadvertently overstated on its income tax return for said year in that the deduction for depletion therein claimed in the amount of $60,269.16 was less than the properly allowable amount of said deduction for the year 1956; (ii) its correct net taxable income for the year 1956 should be determined by allowing as a deduction for depletion the sum of at least $188,191.25 computed upon the correct

basis that the entire amount realized by plaintiff from sales of its cement constituted gross income from mining; (iii) its correct net taxable income for the calendar year 1956 should be determined by allowing as a deduction the entire unamortized past service costs of its pension plan for salaried employees in the sum of at least $237,460.10; (iv) it was not completely liquidated and dissolved by December 31, 1957 and has not been completely liquidated and dissolved since that date; and (v) its correct net taxable income for the year 1956 should be determined by allowing a net operating loss deduction, predicated upon a net operating loss carryback from the year 1959, in the sum of at least $33,487.73. Plaintiff alleges further that said Commissioner of Internal Revenue erroneously failed to allow plaintiff's said refund claim and said amendment thereto in the total amount of $66,575.60.

Wherefore, plaintiff prays judgment against defendant as follows:

1. On its First Claim for Relief for the sum of $162,195.24 together with interest thereon as by law provided.

2. On its Second Claim for Relief for the sum of $145,-898.27 together with interest thereon as by law provided.

3. On its Third Claim for Relief for the sum of $551,-827.38 together with interest thereon as by law provided.

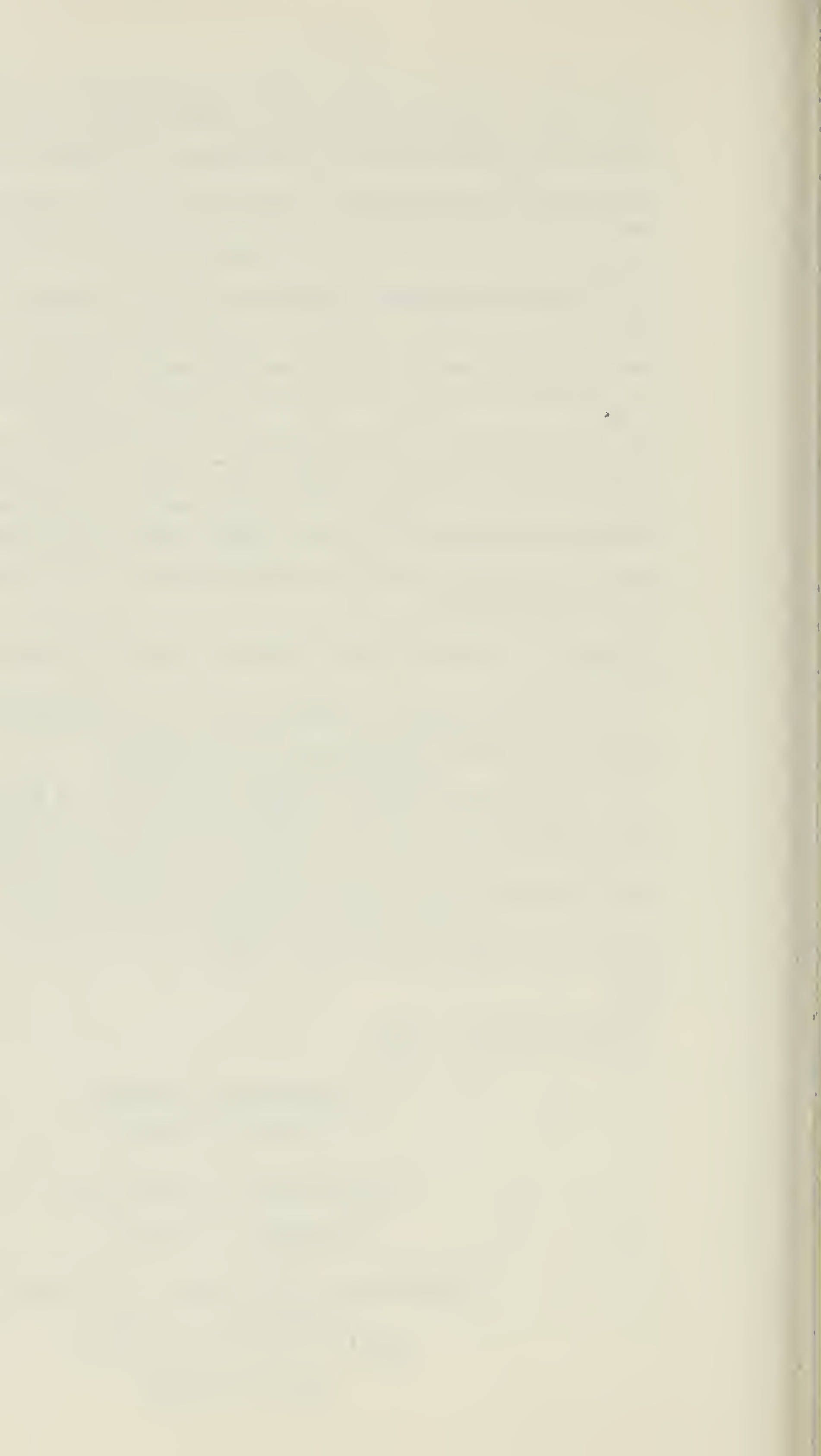
4. On its Fourth Claim for Relief for the sum of $66,575.60 together with interest thereon as by law provided.

Dated: October , 1962.

CLARENCE E. MUSTO
(Clarence E. Musto)

FRANKLIN C. LATCHAM
(Franklin C. Latcham)

MORRISON, FOERSTER, HOLLOWAY, CLINTON & CLARK
(Morrison, Foerster, Holloway, Clinton & Clark)



APPENDIX B

Notices of disallowance of claims from the Internal Revenue Service to Santa Cruz Portland Cement Company, dated November 13, 1962, for taxpayer's claims relating to periods: 1953, 1954, 1954, 1955, 1955, 1956, 1956.

INTERNAL REVENUE SERVICE
DISTRICT DIRECTOR
P. O. BOX 566
SAN FRANCISCO 1, CALIFORNIA

IN REPLY REFER TO
Form L-60
Code XXXX 1312:MG

November 13, 1962

IE MAIL

Cuz Portland Cement Company
lsence E. Musto
Cr cker Building
rcisco, California

IN RE: CLAIM FOR REFUND OF
$162,195.24
FOR THE PERIOD
1953

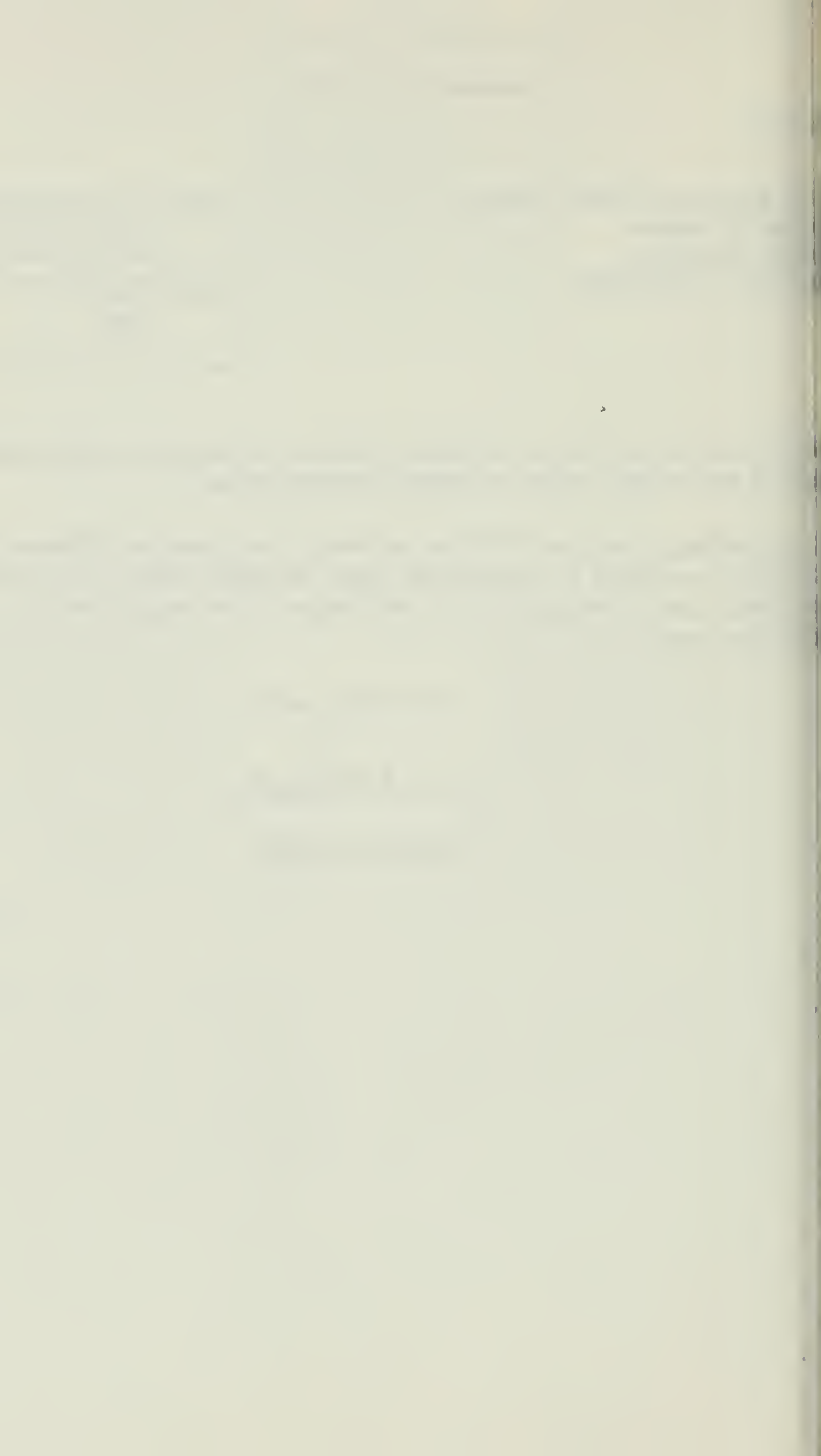
nce with the provisions of existing internal revenue laws, this notice of
wace in full of your claim or claims is hereby given.

proceeding in any court for the recovery of any internal revenue tax,
r other sum which is a part of the claim for which this notice of disal-
e issued, may be begun after the expiration of two years from the date
of this letter.

Very truly yours,

Joseph M. Cullen
Joseph M. Cullen
District Director

FORM L-60 (4-59)



INTERNAL REVENUE SERVICE
DISTRICT DIRECTOR
P. O. BOX 566
SAN FRANCISCO 1, CALIFORNIA

November 13, 1962

IN REPLY REFER TO
Form L-60 MAG
Code XXXX 1312

'I) MAIL

ı ruz Portland Cement Company
:lrence E. Musto
C ocker Building
ancisco, California

IN RE: CLAIM FOR REFUND OF
$115,446.59
FOR THE PERIOD
1954

rance with the provisions of existing internal revenue laws, this notice of
wance in full of your claim or claims is hereby given.

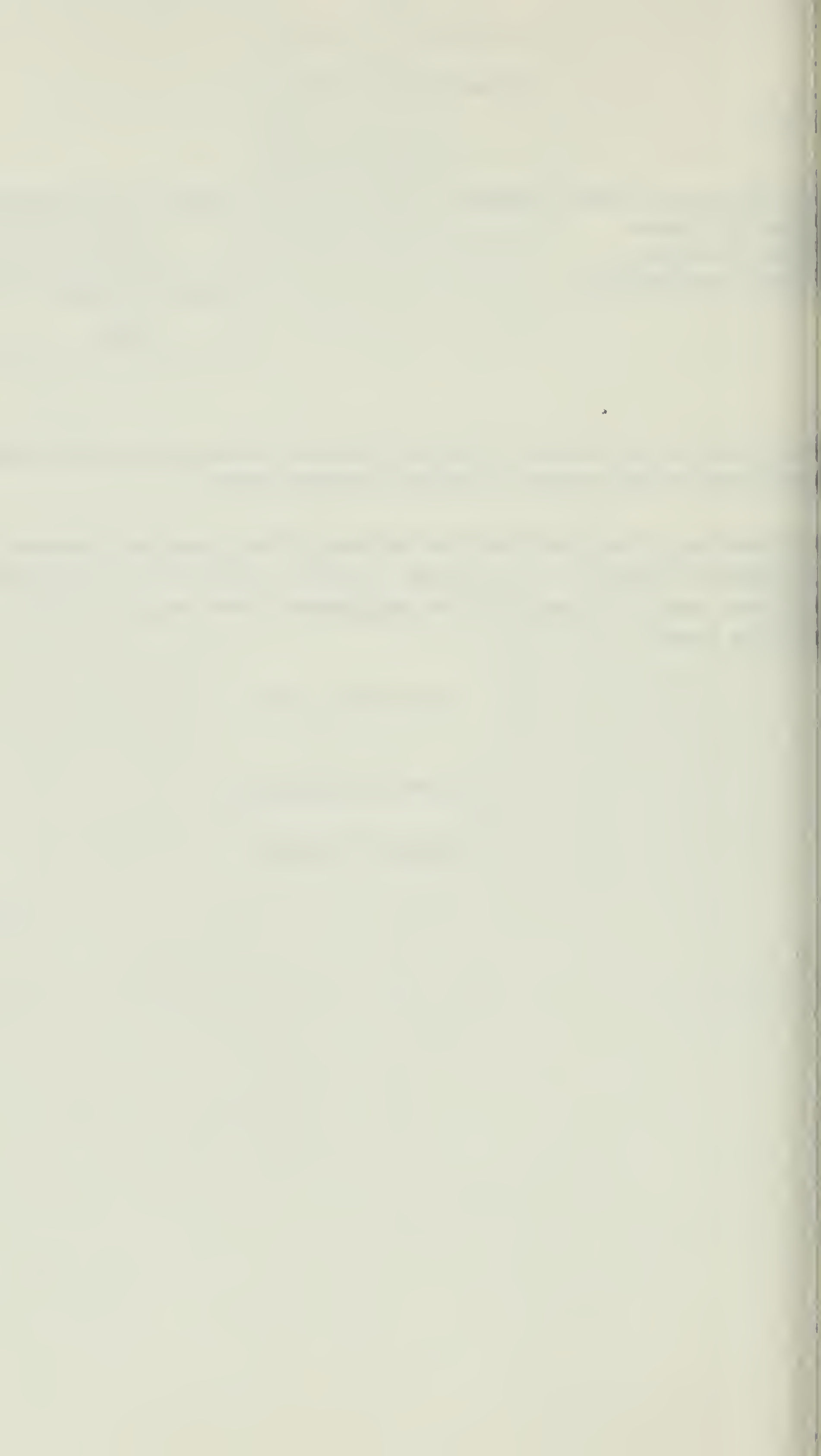
proceeding in any court for the recovery of any internal revenue tax,
or other sum which is a part of the claim for which this notice of disal-
e s issued, may be begun after the expiration of two years from the date
of this letter.

Very truly yours,

Joseph M. Cullen

Joseph M. Cullen
District Director

FORM L-60 (4-59)



INTERNAL REVENUE SERVICE
DISTRICT DIRECTOR
P. O. BOX 566
SAN FRANCISCO 1, CALIFORNIA

November 13, 1962

IN REPLY REFER TO
Form L-60 MAG
Code XXXX 1312

I) MAIL

.ruz Portland Cement Company
l:ence E. Musto
C)cker Building
r.ncisco, California

IN RE: CLAIM FOR REFUND OF
$30,451.68
FOR THE PERIOD
1954

rance with the provisions of existing internal revenue laws, this notice of
w.ice in full of your claim or claims is hereby given.

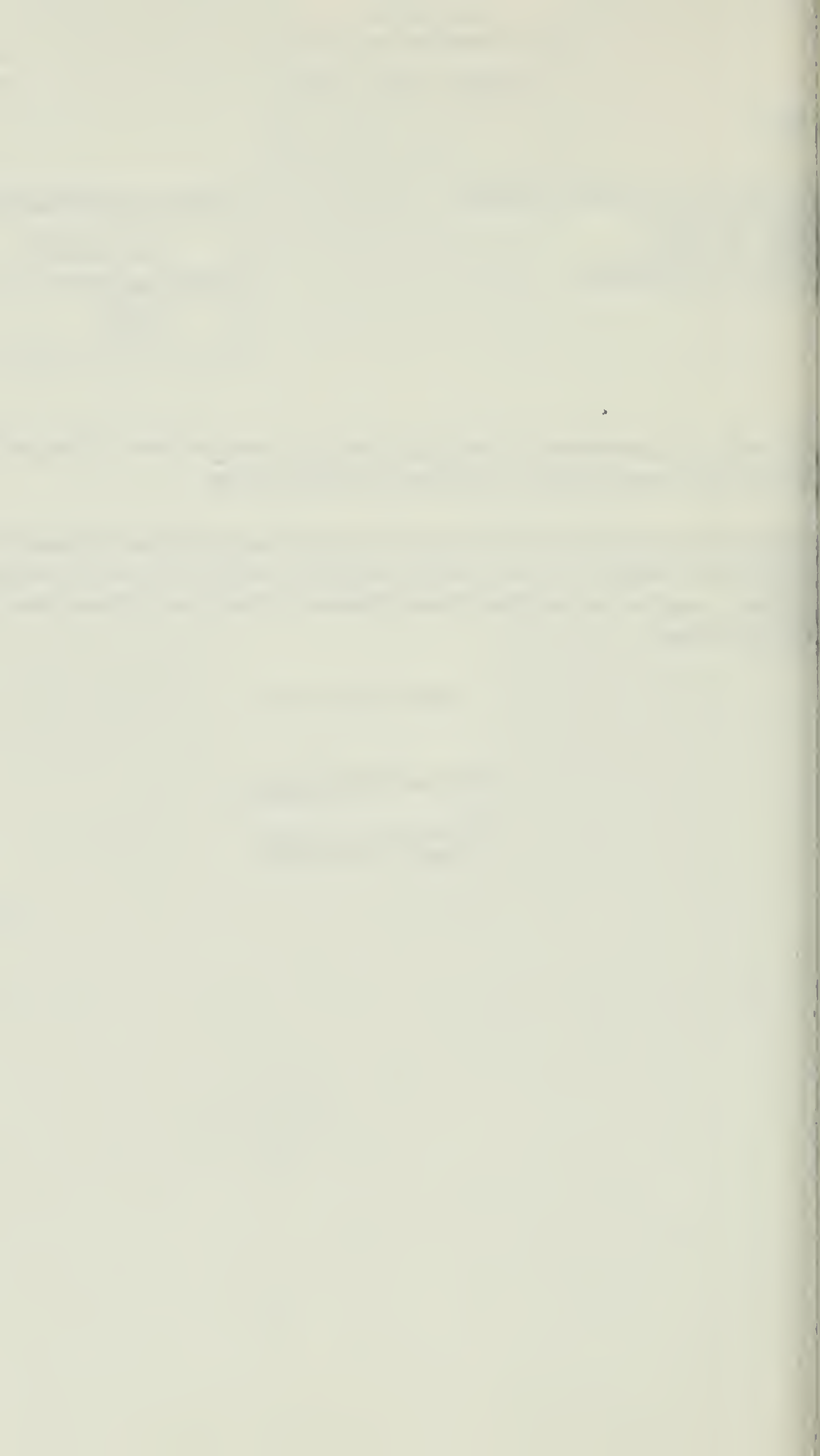
c proceeding in any court for the recovery of any internal revenue tax,
, r other sum which is a part of the claim for which this notice of disal-
e s issued, may be begun after the expiration of two years from the date
i; of this letter.

Very truly yours,

Joseph M. Cullen

Joseph M. Cullen
District Director

FORM L-60 (4-59)



INTERNAL REVENUE SERVICE
DISTRICT DIRECTOR
P. O. BOX 566
SAN FRANCISCO 1, CALIFORNIA

November 13, 1962

IN REPLY REFER TO
Form L-60 MAG
Code ~~XXXX~~ 1312

I) MAIL

ı ruz Portland Cement Company
:]rence E. Musto
(ocker Building
ıncisco, California

IN RE: CLAIM FOR REFUND OF
$527,276.98
FOR THE PERIOD
1955

ıance with the provisions of existing internal revenue laws, this notice of
wnce in full of your claim or claims is hereby given.

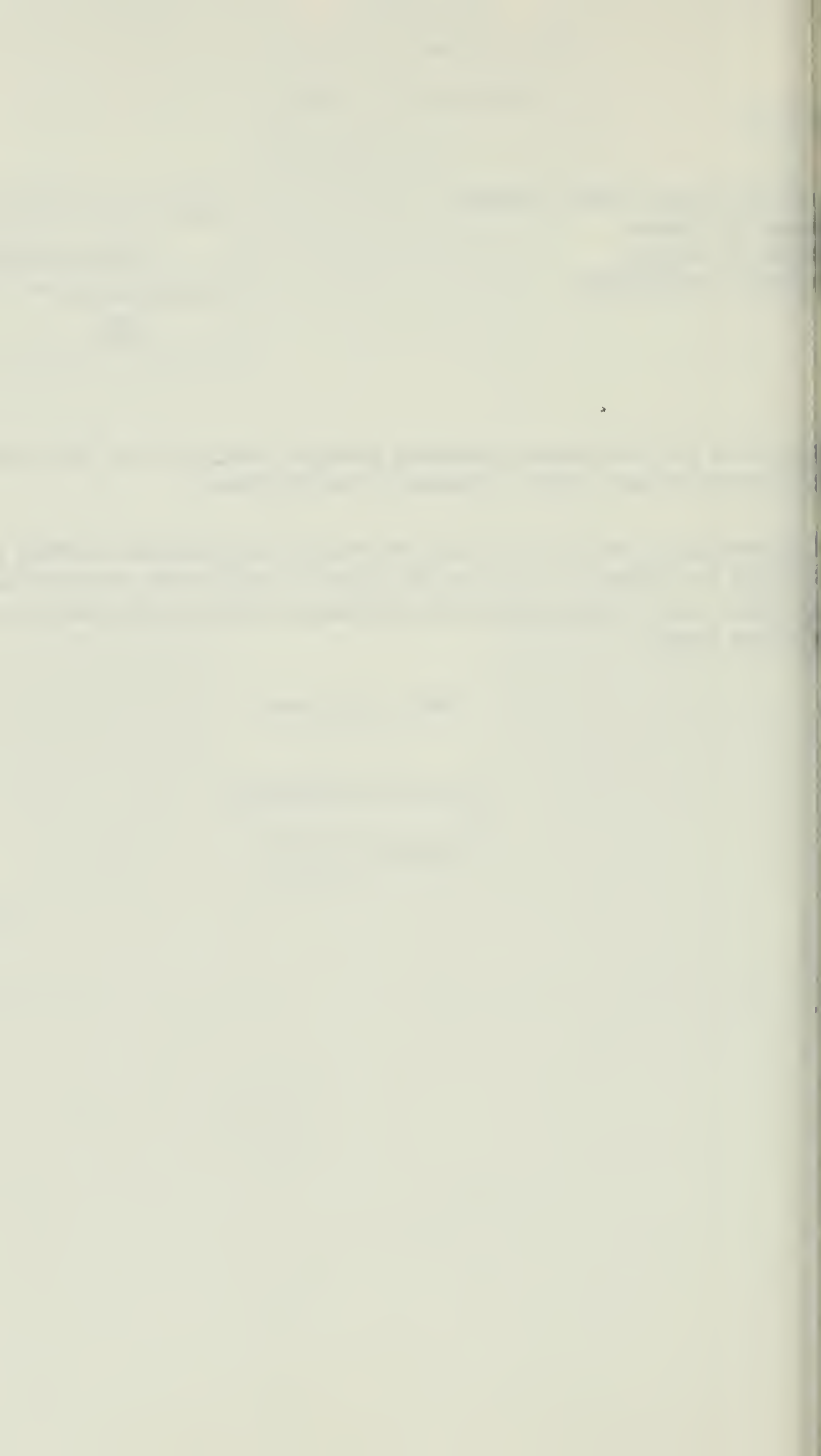
: r proceeding in any court for the recovery of any internal revenue tax,
, or other sum which is a part of the claim for which this notice of disal-
es issued, may be begun after the expiration of two years from the date
ig of this letter.

Very truly yours,

Joseph M. Cullen

Joseph M. Cullen
District Director

FORM L-60 (4-59)



INTERNAL REVENUE SERVICE
DISTRICT DIRECTOR
P. O. BOX 566
SAN FRANCISCO 1, CALIFORNIA

IN REPLY REFER TO
Form L-60 MAG
Code XXXX 1312

November 13, 1962

'ID MAIL

ruz Portland Cement Company
lrence E. Musto
Cocker Building
ncisco, California

IN RE: CLAIM FOR REFUND OF
$24,550.40
FOR THE PERIOD
1955

ance with the provisions of existing internal revenue laws, this notice of
nce in full of your claim or claims is hereby given.

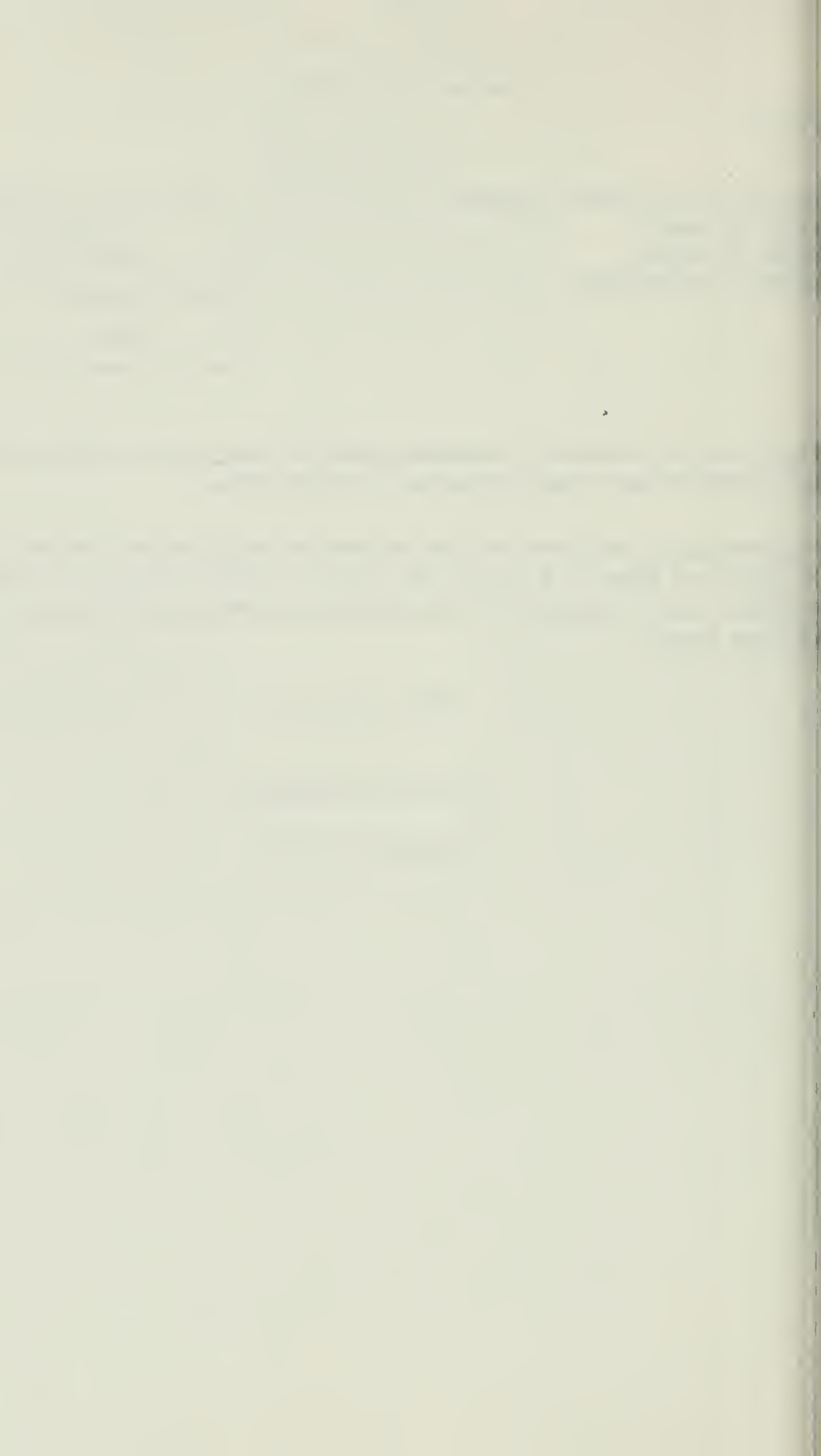
r proceeding in any court for the recovery of any internal revenue tax,
or other sum which is a part of the claim for which this notice of disal-
s issued, may be begun after the expiration of two years from the date
g of this letter.

Very truly yours,

Joseph M. Cullen

Joseph M. Cullen
District Director

FORM L-60 (4-59)



INTERNAL REVENUE SERVICE
DISTRICT DIRECTOR
P. O. BOX 566
SAN FRANCISCO 1, CALIFORNIA

November 13, 1962

IN REPLY REFER TO
Form L-60 MAG
Code XXXX 1312

'ID MAIL

ı ruz Portland Cement Company
]rence E. Musto
(ocker Building
ɥncisco, California

IN RE: CLAIM FOR REFUND OF
$63,370.15
FOR THE PERIOD
1956

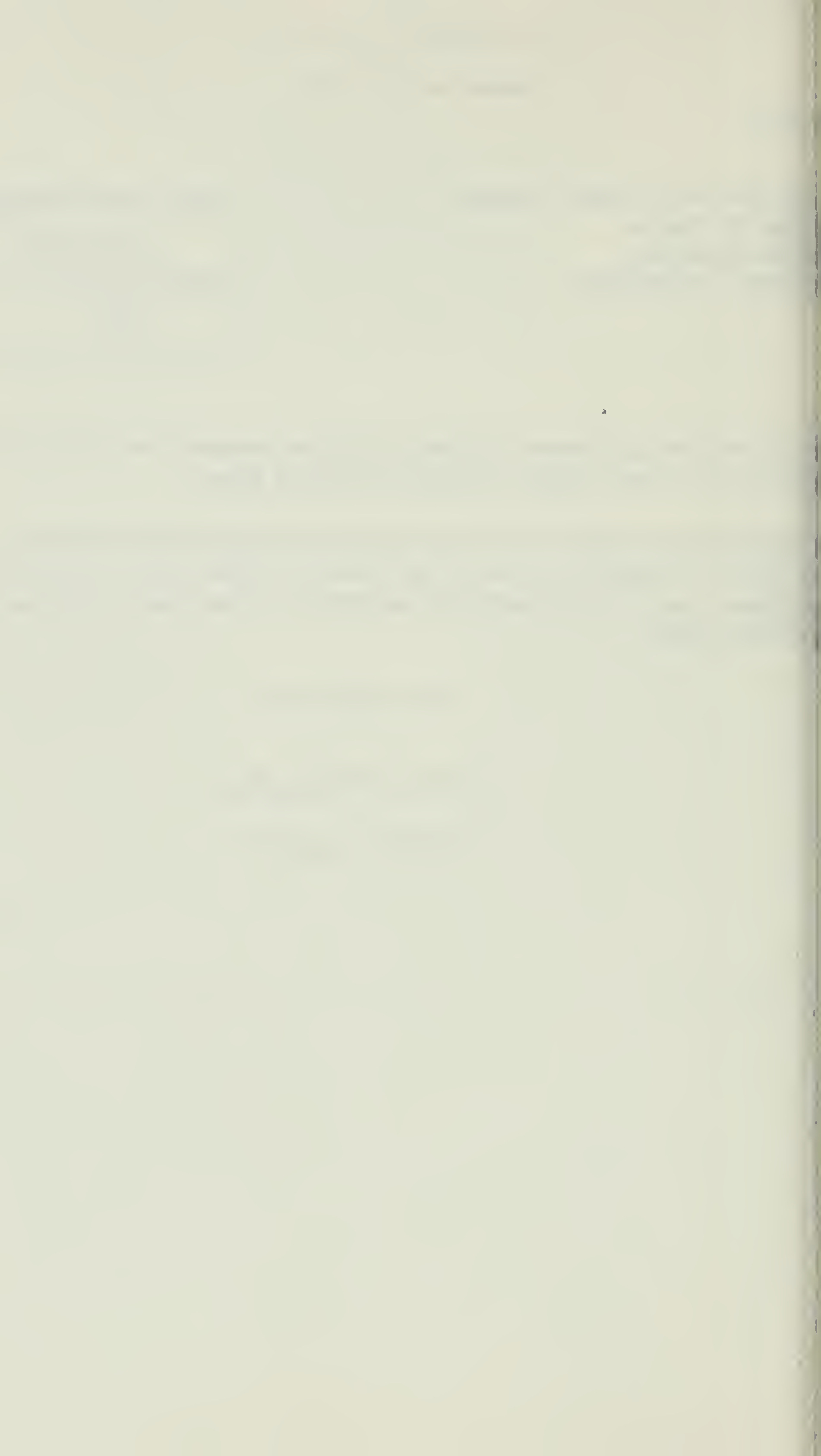
ɪ ance with the provisions of existing internal revenue laws, this notice of
ʌnce in full of your claim or claims is hereby given.

: r proceeding in any court for the recovery of any internal revenue tax,
, or other sum which is a part of the claim for which this notice of disal-
e s issued, may be begun after the expiration of two years from the date
ig of this letter.

Very truly yours,

Joseph M. Cullen
Joseph M. Cullen
District Director

FORM L-60 (4-59)



INTERNAL REVENUE SERVICE
DISTRICT DIRECTOR
P. O. BOX 566
SAN FRANCISCO 1, CALIFORNIA

November 13, 1962

IN REPLY REFER TO
Form L-60 MAG
Code ~~XXXX~~ 1312

ID MAIL

ruz Portland Cement Company
rence E. Musto
ocker Building
ncisco, California

IN RE: CLAIM FOR REFUND OF
$66,575.60
FOR THE PERIOD
1956

ance with the provisions of existing internal revenue laws, this notice of
nce in full of your claim or claims is hereby given.

r proceeding in any court for the recovery of any internal revenue tax,
or other sum which is a part of the claim for which this notice of disal-
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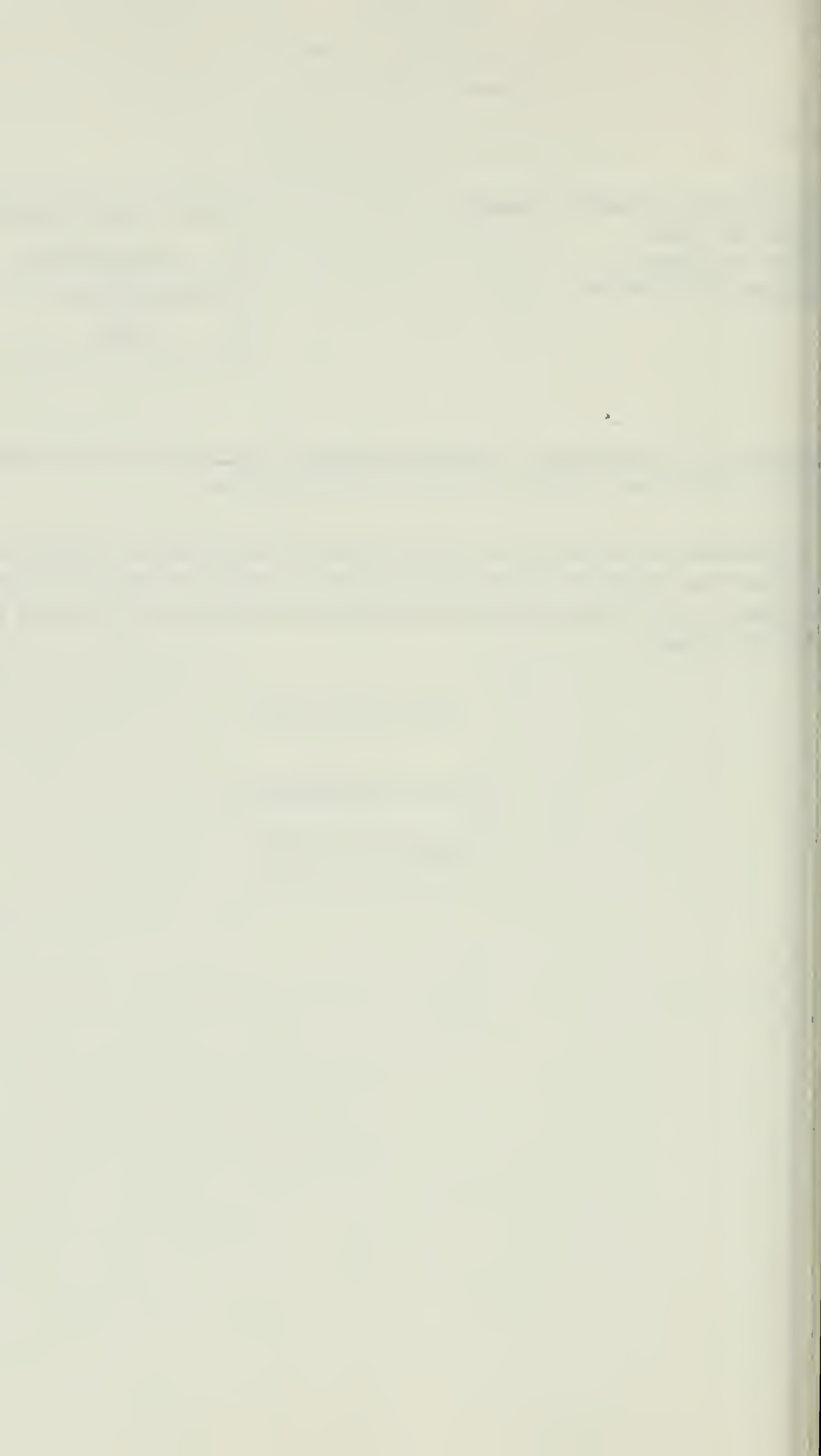
g of this letter.

Very truly yours,

Joseph M. Cullen

Joseph M. Cullen
District Director

FORM L-60 (4-59)



APPENDIX C

1949-1 Cumulative Bulletin, Introductory Notes, pp. III - IV and p. (1) (relating to Commissioner's acquiescence in the *Acampo* decision).

INTRODUCTORY NOTES

The Internal Revenue Cumulative Bulletin 1949–1, in addition to all decisions of the Treasury Department (called Treasury Decisions) pertaining to Internal Revenue matters, contains opinions of the Chief Counsel for the Bureau of Internal Revenue, and rulings and decisions pertaining to income, estate, gift, sales, excess profits, employment, social security, and miscellaneous taxes, and legislation affecting the revenue statutes, as indicated on the title page of this Bulletin, published in the Bulletins (1949, Nos. 1 to 13, inclusive) for the period January 1 to June 30, 1949. It also contains a cumulative list of announcements relating to decisions of The Tax Court of the United States, formerly the United States Board of Tax Appeals, published in the Internal Revenue Bulletin Service from January 1 to June 30, 1949.

Income tax rulings are printed in two parts. The rulings under the Internal Revenue Code are printed as Part I, the law headings corresponding with the sections of the Code, as amended, and the regulations headings corresponding with the section headings of Regulations 111 or 103. Rulings under the Revenue Act of 1938 and prior revenue acts are printed as Part II, the law headings corresponding with the section headings of those revenue acts and the regulations headings corresponding with the article headings of the applicable regulations.

Rulings under Titles VIII and IX of the Social Security Act and under Subchapters A and C, Chapter 9, of the Internal Revenue Code in force prior to January 1, 1940, are published under article headings of Regulations 91 and 90, respectively; rulings under Subchapters A and C, Chapter 9, of the Code in force on or after January 1, 1940, are published under the section headings of Regulations 106 and 107, respectively; rulings under the Carriers Taxing Act of 1937 and under Subchapter B, Chapter 9, of the Code for periods prior to January 1, 1949, are published under the article headings of Regulations 100, and rulings under Subchapter B, Chapter 9, of the Code for periods subsequent to December 31, 1948, will be published under the section headings of Regulations 114.

ABBREVIATIONS

The following abbreviations are used throughout the Bulletin:

A, B, C, etc.—The names of individuals.
A. R. M.—Committee on Appeals and Review memorandum.
A. R. R.—Committee on Appeals and Review recommendation.
A. T.—Alcohol Tax Unit.
B. T. A.—Board of Tax Appeals.
C. B.—Cumulative Bulletin.
Ct. D.—Court decision.
C. S. T.—Capital Stock Tax Division.
C. T.—Taxes on Employment by Carriers.
D. C.—Treasury Department circular.

Em. T.—Taxes imposed by the Social Security Act, the Carriers Taxing Act of 1937, and Subchapters A, B, and C of the Internal Revenue Code.
E. P. C.—Excess Profits Tax Council ruling or memorandum.
E. T.—Estate Tax Division.
G. C. M.—General Counsel's, Assistant General Counsel's, or Chief Counsel's memorandum.
I. R. B.—Internal Revenue Bulletin.
I. R. C.—Internal Revenue Code.
I. T.—Income Tax Unit.
M, N, X, Y, Z, etc.—The names of corporations, places, or businesses, according to context.
Mim.—Mimeographed letter.
MS. or M. T.—Miscellaneous Division.
O. or L. O.—Solicitor's law opinion.
O. D.—Office decision.
Op. A. G.—Opinion of the Attorney General.
P. T.—Processing Tax Division.
S. T.—Sales Tax Division.
Sil.—Silver Tax Division.
S. M.—Solicitor's memorandum.
Sol. Op.—Solicitor's opinion.
S. R.—Solicitor's recommendation.
S. S. T.—Taxes on Employment by others than carriers.
T.—Tobacco Division.
T. B. M.—Advisory Tax Board memorandum.
T. B. R.—Advisory Tax Board recommendation.
T. C.—Tax Court of the United States.
T. D.—Treasury Decision.
x and *y* are used to represent certain numbers, and when used with the word "dollars" represent sums of money.

ANNOUNCEMENT RELATING TO DECISIONS OF THE TAX COURT OF THE UNITED STATES, FORMERLY KNOWN AS THE UNITED STATES BOARD OF TAX APPEALS

In order that taxpayers and the general public may be informed whether the Commissioner has acquiesced in a decision of The Tax Court of the United States, formerly known as the United States Board of Tax Appeals, disallowing a deficiency in tax determined by the Commissioner to be due, announcement will be made in the biweekly Internal Revenue Bulletin at the earliest practicable date. Notice that the Commissioner has acquiesced or nonacquiesced in a decision of the Tax Court relates only to the issue or issues decided adversely to the Government. Decisions so acquiesced in should be relied upon by officers and employees of the Bureau of Internal Revenue as precedents in the disposition of other cases.

THE TAX COURT OF THE UNITED STATES

CUMULATIVE LIST OF ANNOUNCEMENTS RELATING TO DECISIONS OF THE TAX COURT OF THE UNITED STATES PUBLISHED IN THE INTERNAL REVENUE BULLETIN SERVICE FROM JANUARY 1, 1949, TO JUNE 30, 1949, INCLUSIVE

1949–13–13109

The Commissioner acquiesces in the following decisions:

Taxpayer	Docket No.	Report	
		Volume	Page
A			
Abercrombie Co., J. S.[1]	6168	7	120
Acampo Winery & Distilleries, Inc	7637	7	629
Adda, Inc.[2]	8883	9	199
Allen, Hamilton, transferee	9771 11916	11	644
Armored Tank Corporation (N. Y.)	9768	11	644
Averbuch, Sam	9349	12	32
B			
Bechhold, Max, transferee	9772 11927	11	644
Bechhold, Siegfried, transferee	9770 11920	11	644
Beveridge, Catherine S.[3] [4]	12919	10	915
Biddle, Jr., et ux., Anthony J. Drexel	9526	11	868
Blum, Arthur N	12739	11	101
Blumberg, Isaac	16104	11	663
Brown, H. L	12419	11	744
Bryant Trust, Harriet M	14508	11	374
C			
Campbell, James E	15709	11	510
Campbell, John Albert	15710	11	510
Campbell, Vincent C	15707	11	510
City Bank Farmers Trust Co., executor of estate of Boies C. Hart	13441	11	16
Commodores Point Terminal Corporation	15421	11	411
D			
Davis, Montell	17195	11	538
Dean, Marjorie N	10018	10	19
Dempsey's Punch Bowl, Inc., Jack	15153	11	1030
Drew, N. B	16418 16419	12	5

[1] Nonacquiescence published in Cumulative Bulletin 1940–2, page 6, withdrawn.
[2] Partial nonacquiescence published in Cumulative Bulletin 1947–2, page 6, withdrawn.
[3] Gift tax decision.
[4] Nonacquiescence published in Internal Revenue Bulletin 1948–22, page 1, withdrawn.

APPENDIX D

Revenue Ruling 60-320, 1960-2 Cumulative Bulletin, p. 198 (relating to application of *Cannelton* decision if taxpayer did not make election).

lect. Notwithstanding the court's broad language in the *Montreal Mining Company* case, referring to the treatment of cash discount under inventory accounting principles, percentage depletion clearly should not be allowed on such amounts.

The Internal Revenue Service is of the opinion that the result reached in the *Montreal Mining Company* case was correct in view of the facts presented in that case. There the discount allowed by the seller constituted, in substance, a payment by him to the buyer in consideration for the use of the net purchase price in advance of the date when it was otherwise due and payable. As such, the payment was a charge in the nature of interest, deductible from gross income in determining net income.

Among the factors which may point to the existence of a payment which is substantially equivalent to interest are the following:

(1) A discount rate which approximates the prevailing interest rate on bank loans.

(2) A provision for the reduction of the amount of discount as the period of prepayment decreases.

(3) A provision for the payment of an additional amount, depending upon the period of delay, if payment is delayed beyond the due date.

Accordingly, it is held that in determining "gross income from the property" for percentage depletion purposes the gross selling price should be reduced by the amount of any prepayment discount allowed by the taxpayer and utilized by the purchaser unless the discount is a cash discount and one that under all the circumstances is substantially equivalent to a charge in the nature of interest for the use of the net amount paid in advance of the date when it was otherwise due and payable.

Pursuant to the authority in section 7805(b) of the Internal Revenue Code of 1954, the provisions of this Revenue Ruling will not be applied to taxable years ending prior to January 1, 1960.

Revenue Ruling 55–13, C.B. 1955–1, 285, is superseded.

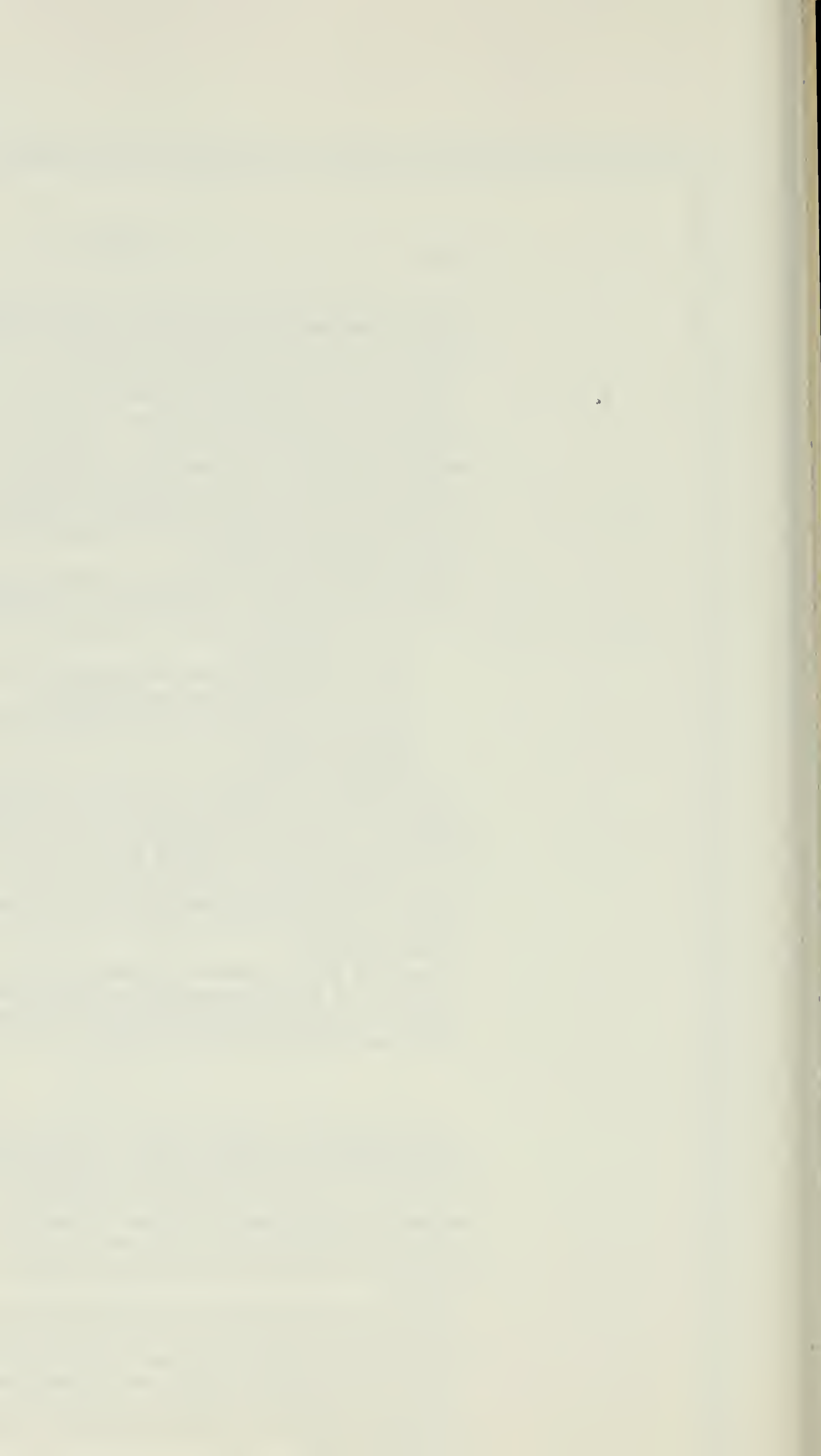
Rev. Rul. 60-[illegible]

The principles of the recent decision of the Supreme Court of the United States in *United States* v. *Cannelton Sewer Pipe Company*, 364 U.S. 76, Ct.D. 1849, page 452, this Bulletin, will be applied in the disposition of cases involving the definition of the term "mining" for purposes of percentage depletion. Also in view of this decision, certain revenue rulings, long in contest by many taxpayers and inconsistent with the position taken administratively and in litigation, will be revoked.

However, the principles of the *Cannelton* decision will not apply in the case of calcium carbonates or other minerals when used in making cement where a proper election is made under section 4 of P.L. 86-7[illegible], page 726, this Bulletin, approved September 14, 1960.

Cases previously examined and closed may be reopened only in accordance with the procedures outlined in Revenue Procedure 59-[illegible], C.B. 1959–2, 938.

[1] Based on Technical Information Release 257, issued September 23, 1960.



APPENDIX E

1961-2 Cumulative Bulletin, pp. 1, 2, 6, 251-54 (relating to Commissioner's withdrawal of acquiescence in the *Acampo* decision).

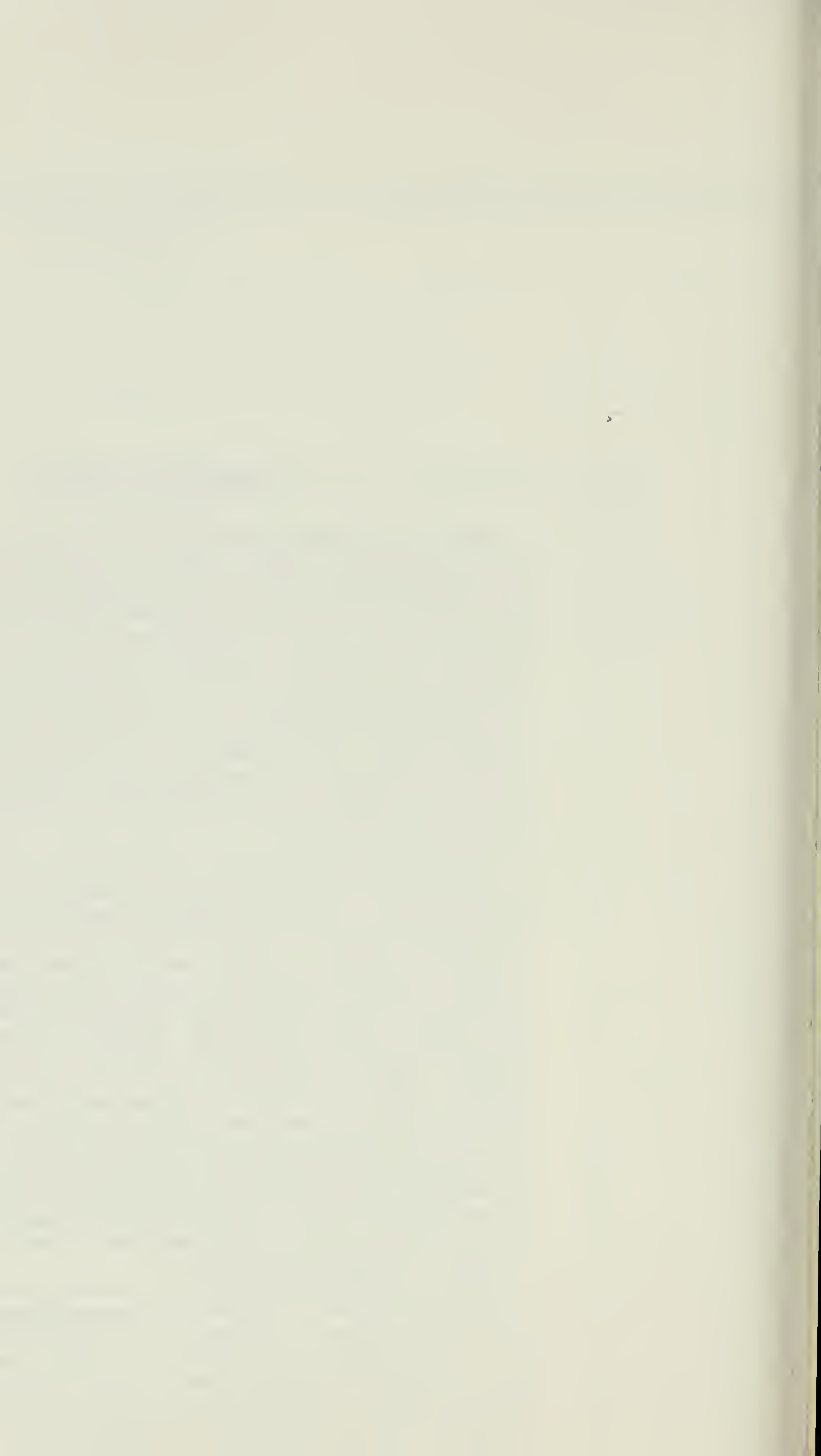
INTRODUCTION

The Internal Revenue Bulletin is the authoritative instrument of the Commissioner of Internal Revenue for the announcement of official rulings and procedures of the Internal Revenue Service, and for the publication of Treasury Decisions, Executive Orders, tax conventions, legislation, and court decisions pertaining to internal revenue matters. Other items considered to be of general interest are also published in the Bulletin, such as announcements relating to proposed regulations published with notice of proposed rulemaking, announcements relating to decisions of the Tax Court of the United States, announcements of the disbarment and suspension of attorneys and agents from practice before the Treasury Department, supplements to the Cumulative List of Organizations contributions to which are deductible under section 170 of the Internal Revenue Code of 1954, Delegation Orders, etc.

It is the policy of the Service to publish in the Bulletin all substantive and procedural rulings of importance or of general interest, the publication of which is considered necessary to promote a uniform application of the laws administered by the Service. It is also the policy to publish all rulings and statements of procedures which supersede, revoke, modify, or amend any published ruling or procedure. Except where otherwise indicated, published rulings and procedures apply retroactively. Rulings and statements of procedures relating solely to matters of internal management are not published. However, statements of internal practices and procedures affecting rights or duties of taxpayers, or industry regulation, which appear in internal management documents, are published. Revenue Rulings and Revenue Procedures are based upon rulings and internal management documents prepared in the various divisions of the National Office, including the Office of the Chief Counsel for the Internal Revenue Service. In the preparation of these, caution is exercised to conceal the identity of the taxpayer, as well as any confidential personal and business information.

Revenue Rulings and Revenue Procedures reported in the Bulletin do not have the force and effect of Treasury Department Regulations (including Treasury Decisions), but are published to provide precedents to be used in the disposition of other cases, and may be cited and relied upon for that purpose. No unpublished ruling or decision will be cited or relied upon by any officer or employee of the Internal Revenue Service as a precedent in the disposition of other cases.

Since each published ruling represents the conclusion of the Service as to the application of the law to the entire state of facts involved, Service personnel and others concerned are cautioned against reaching the same conclusions in other cases unless the facts and circumstances are substantially the same. In applying rulings and procedures pub-



lished in the Bulletin, personnel of the Service and others concerned must consider the effect of subsequent legislation, regulations, court decisions, rulings and procedures.

Each published ruling is designated as a "Revenue Ruling," and each published procedure is designated as a "Revenue Procedure." These should be cited by reference to the year of issuance and the Bulletin and page where reported. Thus, Revenue Ruling No. 121 for 1961 should be cited as "Rev. Rul. 61–121, C.B. 1961–2, 65." Similarly, Revenue Procedure No. 16 for 1961 should be cited as "Rev. Proc. 61–16, C.B. 1961–2, 548." Revenue Rulings are keyed to the applicable sections of the Internal Revenue Code and regulations.

Internal Revenue Cumulative Bulletin 1961–2 contains all rulings, decisions, and procedures pertaining to Internal Revenue matters published in the weekly Internal Revenue Bulletins 27–52, inclusive, for the period July 1 to December 31, 1961. It includes an index to all matters published during the year in the weekly Bulletins and consolidated in the Cumulative Bulletins. It also contains a cumulative list of announcements relating to decisions of The Tax Court of the United States published in the Internal Revenue Bulletins.

The contents of this publication are not copyrighted and may be reprinted freely. A citation of the *Cumulative Bulletin* as the source would be appropriate.

The Commissioner does NOT ACQUIESCE in the following decisions:

Taxpayer	Docket No.	Report	
		Volume	Page
Acampo Winery and Distilleries, Inc.[11]	7637	7	629
Arents, Lena R., estate of [2]	65650	34	274
Dill Co	66217	33	196
Halquist, Albin C., et ux	65794 71133	33	304
Kuckenberg, Harriet, transferee Kuckenberg, Henry A., transferee Kuckenberg, Lawrence W., transferee	75198 75197 75199	35	473
Laurent, Milton P., Sr., estate of, and Ruby S. Laurent	59767 61340	34	385
Olmsted Incorporated Life Agency	78887	35	429
Rudman, Frank A., et al., independent executors of the estate of Milton P. Laurent, Sr	59767 61340	34	385
Stark, Sidney, et ux	57701	29	122
State-Adams Corp	63743	32	365
United States Trust Company of New York, et al., executors of estate of Lena R. Arents [2]	65650	34	274

[a] United States Board of Tax Appeals.

[1] Gift tax decision.

[2] Estate tax decision.

[3] Acquiescence relates only to the issue whether petitioners' income from commissions or area managers' fees was from sources outside the United States.

[4] Nonacquiescence published in C.B. 1954-1, 8, relating to the issue whether under the retirement method of accounting retirement losses deductible under section 23(l) of the Internal Revenue Code of 1939 must be reduced by pre-1913 depreciation, is withdrawn and acquiescence is substituted therefor.

[5] Acquiescence in result only. Acquiescence "in result only" means acceptance of the decision of the Court but disagreement with some or all of the reasons assigned for the decision.

[6] Acquiescence relates only to the issue whether petitioner, a cash-basis taxpayer, may elect to take as a credit in 1953 foreign taxes accrued for 1953 as well as foreign taxes for prior years paid in 1953.

[7] Nonacquiescence published in C.B. 1945, 8, is withdrawn and acquiescence is substituted therefor.

[8] Nonacquiescence published in C.B. 1950-2, 6, relating to the issue whether amounts claimed on the retirement of assets under the retirement method of accounting must be reduced by pre-1913 depreciation, is withdrawn and acquiescence is substituted therefor.

[9] Acquiescence relates only to the issue concerning the amount of accounts receivable as of December 31, 1952, which are properly excludable from the 1953 taxable income.

[10] Nonacquiescence published in C.B. XV-1, 47 (1936), and C.B. XV-2, 49 (1936), relating to the issue regarding cost of intercompany transportation of material used in construction of capital assets, is withdrawn and acquiescence is substituted therefor. Acquiescenses and nonacquiescenses in the remaining issues in this case are unchanged.

[11] Acquiescence in the issue whether the petitioner is entitled to deductions in fiscal year 1913 for the carryback of net operating losses of the two succeeding years during which the corporation was liquidating, published in C.B. 1949-1, 1, is withdrawn and nonacquiescence is substituted therefor. See Rev. Rul., 61-191, page 251, this Bulletin. Acquiescence, in the issue whether the sale of assets distributed in partial liquidation was for the shareholders or the corporation and the issue relating to the amount of the opening inventory for fiscal year 1943, published in C.B. 1949-1, 1, remains unchanged.

The beneficiary-stockholders in *Ducros* contended the amounts were excludable from gross income as the proceeds of a life insurance contract paid by reason of the insured's death.

The court held that, under local law, there was a valid life insurance contract and that the insurance proceeds were never an asset of, nor distributed by, the corporation and, therefore, the proceeds did not constitute a taxable dividend.

In so holding, the court distinguished *Edwin L. Cummings et al.* v. *Commissioner*, 73 Fed. (2d) 477, Ct. D. 952, C.B. XIV-1, 209 (1935), where the insurance proceeds were paid to the corporation which, in turn, distributed the proceeds to the stockholders, and *Delia B. Golden* v. *Commissioner*, 113 Fed. (2d) 590 (1940), where, although the insurance proceeds were paid to a trust as agent of the corporation for distribution to stockholders, the corporation retained valuable incidents of ownership.

It is the position of the Service that life insurance proceeds paid to shareholders of a corporation are taxable as dividends in cases where the corporation uses its earnings to pay the insurance premiums and has all the incidents of ownership including the right to name itself beneficiary, even though the corporation does not name itself beneficiary and, therefore, is not entitled to, and does not in fact, receive the proceeds.

Although review by the Supreme Court of the United States was not requested in the *Ducros* case, the decision will not be followed as a precedent in the disposition of similar cases, and the Service will maintain its position pending further developments on the issue.

REGULATIONS 118, SECTION 39.115(a)-1: Dividends.

Proceeds of insurance on the life of an officer of a closely held corporation paid directly to shareholders of the corporation. See Rev. Rul. 61-134, page 250.

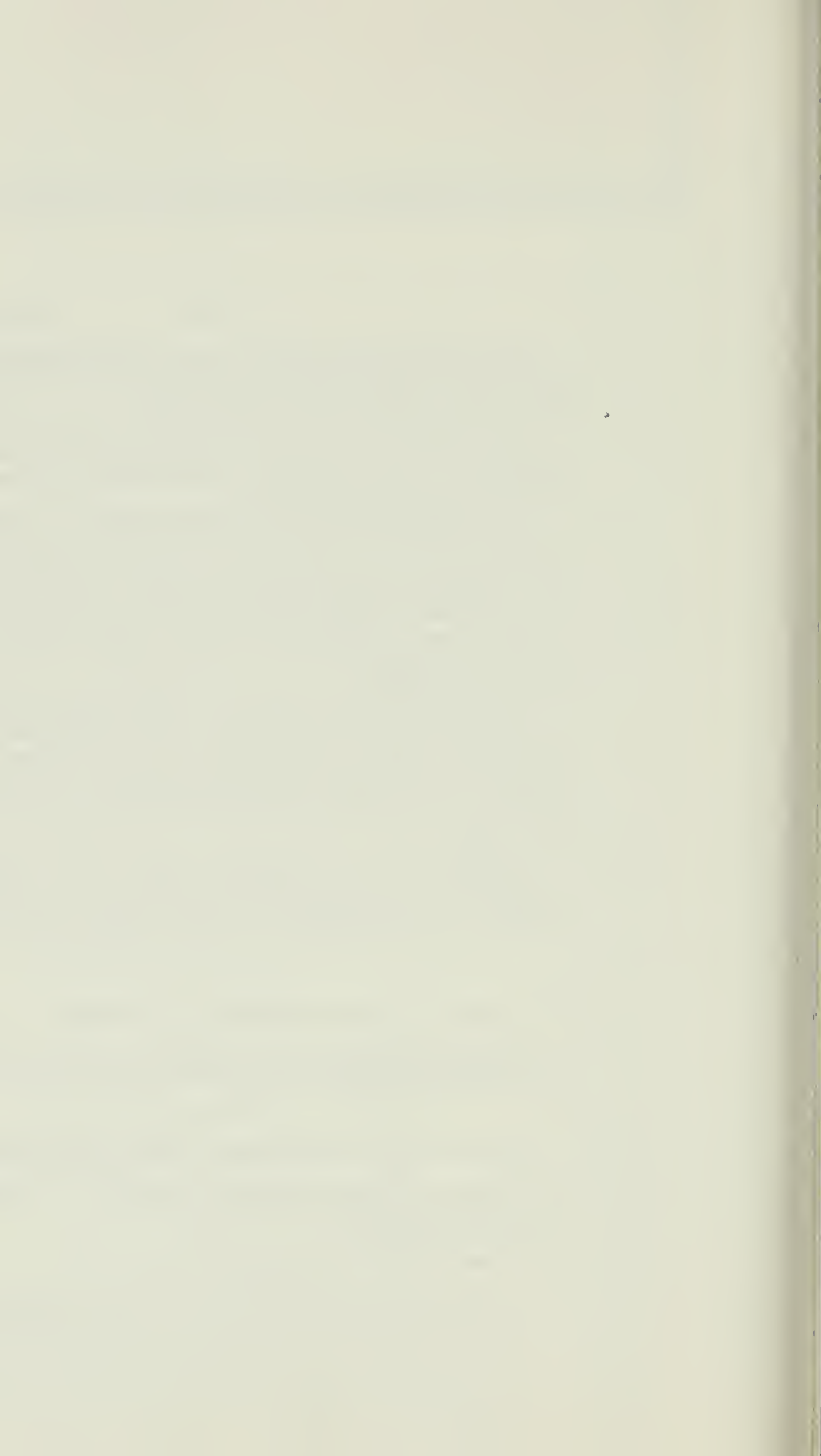
SECTION 122.—NET OPERATING LOSS DEDUCTION

REGULATIONS 118, SECTION 39.122-4: Computation of net operating loss carryback. Rev. Rul. 61-191
(Also Section 23(s).)
(Also Part I, Section 172; 26 CFR 1.172-1.)

Losses sustained or excess profits tax credits remaining unused by a corporation subsequent to the date that it is de facto dissolved may not be carried back to prior taxable years. For the purpose of such carrybacks a de facto dissolution occurs when a corporation has disposed of all or most of its operating assets, terminated its regular business activities, and become a mere shell, a corporation in name and semblance only, without real corporate substance, serving no real corporate purpose, and having no valid or compelling business reason for continuing its existence, even though not formally dissolved.

Nonacquiescence substituted for acquiescence in *Acampo Winery and Distilleries, Inc.* v. *Commissioner*, 7 T.C. 629.

Reconsideration has been given to the acquiescence by the Commissioner of Internal Revenue in the decision in *Acampo Winery and Distilleries, Incorporated* v. *Commissioner*, 7 T.C. 629 (1946), ac-



quiescence, C.B. 1949-1, 1, insofar as it relates to the fourth issue involved, namely, a carryback to the year 1943 of net operating losses sustained in the years 1944 and 1945.

In the *Acampo* case, the taxpayer corporation in the early part of 1943 had a large inventory of wine which the majority of its stockholders desired to dispose of but which the officers and directors refused to permit it to sell because of the heavy taxes which would result. Accordingly, on February 11, 1943, a majority of the stockholders approved a plan of dissolution under which the corporation was to distribute the bulk of its assets to three trustees, who, acting in behalf of the stockholders, were to sell the assets, thus avoiding the tax liability which would have been incurred by the corporation were it to make such a sale. The assets involved included wine, winery, real estate, and other items. On or about February 26, 1943, the corporation made appropriate conveyances thereof to the trustees, retaining only a small portion of the wine and a few other assets to meet some commitments, to pay some taxes and other obligations, and to pay the expenses of winding up its affairs. Thereupon, the corporation ceased doing business and proceeded to conclude its affairs in complete liquidation and dissolution. On March 25, 1943, the trustees sold the assets conveyed to them to a third party.

In 1944 and 1945 the corporation sustained net losses which it sought to carry back and use as a net operating loss deduction for 1943, under sections 23(s) and 122 of the Internal Revenue Code of 1939. The Commissioner disallowed the net operating loss deduction on the ground that the corporation was substantially liquidated and marking time during 1944 and 1945 and that it was no more the taxpayer it was in previous years, in substance and in fact, than if it had formally changed its existence. However, the Tax Court of the United States allowed the carryback and deduction in question, stating in effect that the words of the statute are general in their application and that to warrant denial of the carryback something which is not there would have to be read into the pertinent provisions of law to limit them so that they would not apply.

Notwithstanding the fact that in *Acampo* the Tax Court thus *allowed* carrybacks of *net operating losses* from years in which the corporate taxpayer had become moribund, in the subsequent case of *Wier Long Leaf Lumber Company* v. *Commissioner*, 9 T.C. 990, affirmed in part and reversed in part, 173 Fed. (2d) 549(1949), it was held that where, pursuant to resolutions of the stockholders and board of directors consenting to liquidation and dissolution, a corporation had in 1942 ceased productive activity and sold the bulk of its operating properties, including land, a sawmill and other improvements, tractors, and automobiles, it was *not* entitled to carry back its *unused excess profits credits* for 1944 and 1945 to a prior year.

In affirming in part and reversing in part, the United States Court of Appeals for the Fifth Circuit stated:

> We agree with * * * [the Commissioner] * * * that if it appears that the corporation is a corporation in name and semblance only, without corporate substance and serving no real corporate purpose, it must, though not formally dissolved, be treated as dissolved de facto.

Thereupon, on the facts present in *Wier*, the Court of Appeals concluded that in *1943* the taxpayer was still in fact as well as in form

corporation and was, therefore, entitled to carry back its unused excess profits credit for that year. However, the Court of Appeals also found from the facts that by the *end* of 1943, liquidation of the corporation had progressed to a point at which there was no longer any valid reason for delaying complete dissolution and that, though not dissolved de jure, the corporation must be regarded as dissolved de facto and a carryback of the unused excess profits credit from *1944* denied.

Following the decision of the Court of Appeals for the Fifth Circuit in *Wier*, in *Winter & Company, Inc.* (*Indiana*) v. *Commissioner*. 13 T.C. 108 (1949), appeal dismissed by the United States Court of Appeals for the Seventh Circuit on April 16, 1951, the Tax Court itself denied carrybacks of *both* unused excess profits credits *and* net operating losses where the corporation involved had ceased all operations, had no earnings and no business expense and had shipped its plant equipment, inventories, and all other tangible assets to its parent, retaining only intangible assets consisting of credits on the parent's books in respect of such assets and of accounts receivable. As authority for its denial of the unused excess profits credit carryback in *Winter*, the Tax Court quoted the statement of the Court of Appeals in *Wier* as to de facto dissolution, and, in denying the *net operating loss carryback*. the court held also that since, after the date by which the corporation had disposed of its assets and ceased its activities, it was not engaged in a business or other operation, it could not have had an operating loss for a tax year subsequent to that date.

Other cases subsequent to the decision of the Court of Appeals in *Wier* and the Tax Court decision in *Winter*, in which a carryback of a net operating loss, an unused excess profits credit, or both, was denied in circumstances indicating a de facto corporate dissolution, include *ABC Brewing Corporation* v. *Commissioner*, 20 T.C. 515 (1953), acquiescence, C.B. 1954-1, 3, affirmed, 224 Fed. (2d) 483 (1955); *Diamond A. Cattle Company* v. *Commissioner*, 21 T.C. 1 (1953), affirmed in part and vacated and remanded in part, 233 Fed. (2d) 739 (1956); *Wheeler Insulated Wire Company Incorporated* v. *Commissioner*, 22 T.C. 380 (1954); and *American Well and Prospecting Company* v. *Commissioner*, 23 T.C. 503 (1954), affirmed, 232 Fed. (2d) 934 (1956), certiorari denied, 352 U.S. 840 (1956).

The principle of de facto dissolution is well established in the law and has been followed in determining corporate existence in connection with numerous questions other than carrybacks of net operating losses and unused excess profits tax credits. See *Kamin Chevrolet Company* v. *Commissioner*, 3 T.C. 1076 (1944), acquiescence, C.B. 1944, 15; *Eastern Grain Elevator Corp.* v. *McGowan*, 95 Fed. Supp. 40 (1950); I.T. 3871, C.B. 1947-2, 62; Rev. Rul. 215, C.B. 1953-2, 149; Rev. Rul. 54-518, C.B. 1954-2, 142; and Rev. Rul. 55-94, C.B. 1955-1, 119. Compare *James P. Neill, et al.* v. *Phinney*, 245 Fed. (2d) 645 (1957).

In the light of the foregoing, it is held that net operating losses sustained or excess profits tax credits remaining unused by a corporation subsequent to the date that it is de facto dissolved may not be carried back to prior taxable years. For the purpose of such carrybacks, a de facto dissolution occurs when a corporation has disposed

of all or most of its operating assets, terminated its business activities, and become a mere shell, a corporation in name and semblance only, without real corporate substance, serving no real corporate purpose, and having no valid or compelling reason for continuing its existence, even though not formally dissolved.

In the *Acampo Winery & Distilleries, Inc.*, case, in reaching the conclusion that the net operating loss carrybacks there in issue were allowable, the court appears not to have given consideration to the question whether or not the corporation involved was de facto dissolved prior to the years in which the net operating losses were sustained. Accordingly, insofar as it relates to the net operating loss carryback issue, the decision in *Acampo* will not be followed and the prior acquiescence, C.B. 1949-1, 1, is withdrawn and non-acquiescence substituted therefor. See page 6, this Bulletin. As to the remaining issues in *Acampo*, the prior acquiescence remains unchanged.

SUPPLEMENT D.—RETURNS AND PAYMENT OF TAX

SECTION 145.—PENALTIES

REGULATIONS 118, SECTION 39.145-1: Penalties.

Exclusion of embezzled funds from gross income. See Ct. D. 1863, page 9.

SUBCHAPTER D.—EXCESS PROFITS TAX

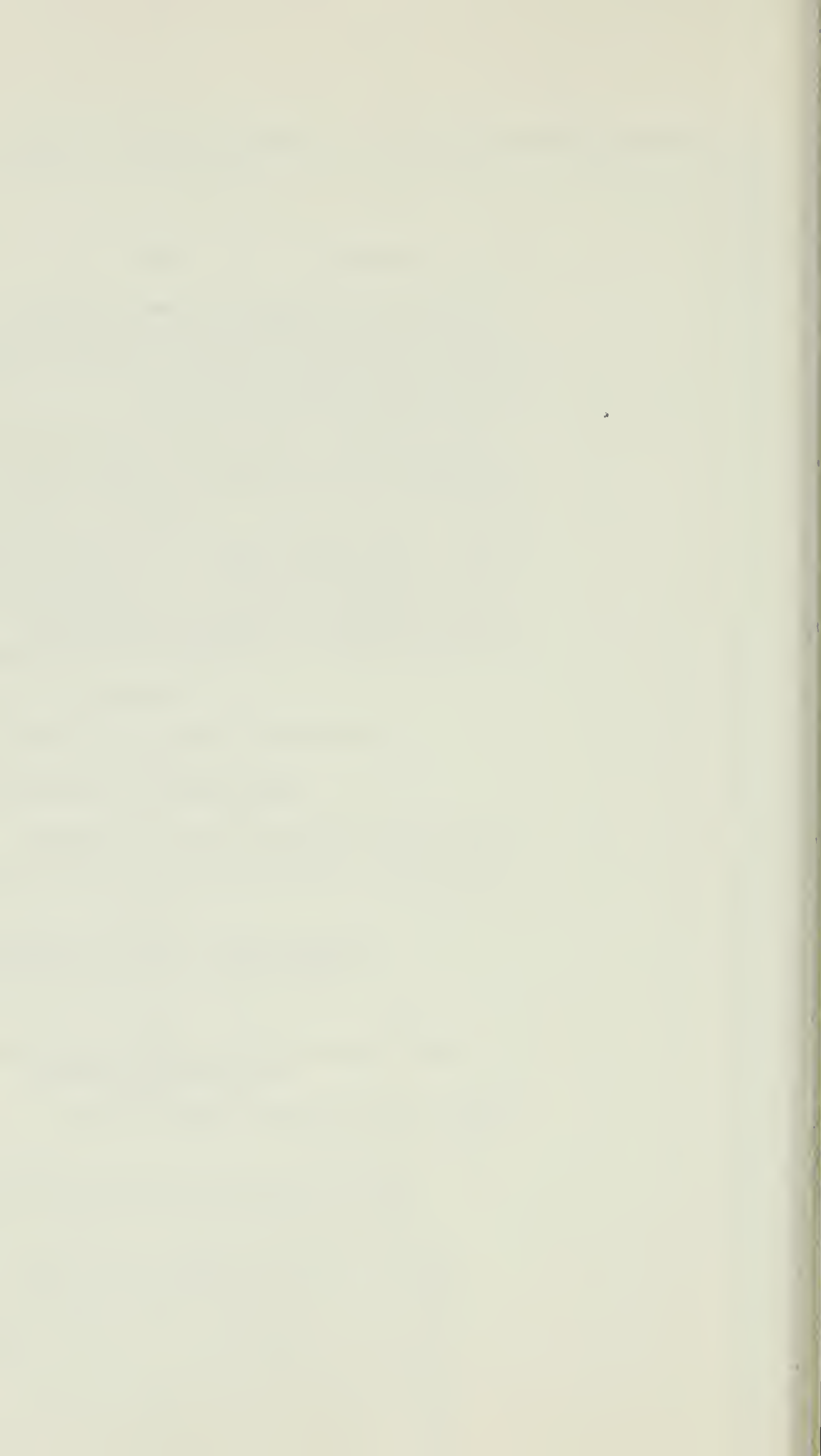
PART I.—RATE AND COMPUTATION OF TAX

SECTION 456.—ABNORMALITIES IN INCOME IN TAXABLE PERIOD

REGULATIONS 130, SECTION 40.456-2: Classification of income. Ct. D. 18[illegible]

1. EXCESS PROFITS TAXES—ABNORMAL INCOME RECEIVED IN EXCESS PROFITS TAX YEAR—NEW DRUGS AND PATENTED PRODUCTS AS "DISCOVERIES."

The relief afforded by section 456(a)(2)(B) of the Excess Profits Tax Act of 1950 for abnormal income resulting from "discovery" does not extend to income from sales of newly patented drugs and photographic equipment made under new patents. The word "discovery," as read in context with "exploration, discovery, or prospecting," means only the discovery of mineral resources and does not include the development of patentable products or processes. Taxpayer's contention that even if the income here was not specifically provided for in any of the subparagraphs of paragraph (2) it would come under the final sentence of that paragraph as "income of any class not described in subparagraphs (A) to (D)" is without merit. Even if the statute gave the Secretary of the Treasury power to expand the classes of abnormal income beyond those enumerated he has not done so. His regulations specifically exclude "research and development" income from classification of abnormal income.



I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

WILLIAM R. BERKMAN

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CERTIFICATE OF SERVICE BY MAIL

WILLIAM R. BERKMAN hereby certifies:

That his business address is Eleventh Floor, Crocker Building, San Francisco 4, California; that he is an active member of the State Bar of California and that he is not a party to the cause.

That on the date hereof he served a copy of Brief For Appellant by placing three copies of said document in an envelope addressed as follows:

JOHN B. JONES, JR., ESQ.
Acting Assistant Attorney General
U. S. Department of Justice
Tax Division
Washington, D. C.

That said envelope was then sealed and postage fully prepaid thereon and on said date was deposited in the United States mail at San Francisco, California.

Dated: January 2, 1963.

WILLIAM R. BERKMAN

William R. Berkman